(2)

Supreme Court, U.S.
FILED

04 785 NOV 29 2004

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

RICHARD J. FOREST; NANCY FOREST;
ELIZABETH FOREST, PETITIONERS

v.

PAWTUCKET POLICE DEPARTMENT; CITY OF PAWTUCKET, BY AND THROUGH ITS TREASURER, RONALD WUNSCHEL; SCOTT M. FEELEY, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY; JOHN CLARKSON, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY; GEORGE L. KELLEY, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY; DENNIS SMITH, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY; WILLIAM MAGILL, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY;

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Jeffrey D. Sowa, Esq.
LaPlante & Sowa, Ltd.,
67 Cedar Street, Suite 102
Providence, RI 02903
TEL: (401) 273-0200
Attorney for Petitioners

CURRY & TAYLOR ♦ WASH D.C. ♦ (202) 223-3160 ♦ USSCINFO.COM

QUESTIONS PRESENTED

1. Whether Respondents were reasonable in relying **solely** upon an adolescent student's facially unbelievable story that he was allegedly molested in the presence of classmates and staff, to determine that they possessed probable cause.

2. Whether Respondents improperly disregarded the presence of readily available witnesses in determining they possessed probable cause.

3. Whether it was improper for the United States Court of Appeals for the First Circuit to develop and substitute its own conclusion that an adolescent student's learning disability and medication prescribed for such disability did not affect the adolescent's credibility, despite the fact that the police officer admitted having no knowledge about whether either the disability or medication prescribed affected the complainant's trustworthiness.

4. Whether Respondents were unreasonable in failing to interview readily available witnesses about an adolescent complainant's allegation of molestation, despite the complainant's contention that he blurted out an exclamatory statement at the time of the alleged incident, in the presence of other students and staff.

5. Whether Respondents acted unreasonably in omitting crucial facts from the affidavit in support of an arrest warrant including, but not limited to, that the incident allegedly occurred openly in the presence of students and staff who were not questioned about the truthfulness of the allegation.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT PROVISIONS INVOLVED 1

STATEMENT 2

REASONS FOR GRANTING THE PETITION 7

CONCLUSION 21

APPENDIX

CIRCUIT COURT OPINION 1a

DISTRICT COURT DECISION 13a

ORDER DENYING REHEARING 45a

RELEVANT PROVISIONS 47a

TABLE OF AUTHORITIES

Page

CASES

ACOSTA v. AMES DEPT. STORES, INC., 386 F.3D. 5 (1ST CIR. 2004) 8

B.C.R. TRANSPORT CO. v. FONTAINE, 727 F.2D 7, 10 (1ST CIR. 1984) 8

BEVIER v. HUCAL, 806 F.2D 123 (7TH CIR. 1986) 12, 13, 14

FLOYD v. FARRELL, 765 F.2D 1, 5 (1ST CIR. 1985) 12

FRANKS v. DELAWARE, 438 U.S. 154 (1978) 20

HOLLAND v. CITY OF PORTLAND, 102 F.3D 6, 9 (1ST CIR. 1996) 12

MALLEY v. BRIGGS, 475 U.S. 335 (1986) 20

MENEBHI v. MATTOS, 183 F.SUPP. 2D 490, 500 (D.R.I. 2002) 8, 20

MOORE v. THE MARKETPLACE RESTAURANT, INC., 754 F.2D 1336, 1347 (7TH CIR. 1985) 14

RICCI v. URSO, 974 F.2D 5,6 (1ST CIR. 1992) 12

RODRIGUEZ v. COMAS, 888 F. 2D 899, 902 (1ST CIR. 1989) 12

STATE v. DEMAGISTRIS, 714 A.2D 567, 575 (R.I. 1998) 20

STATUTES

28 U.S.C. §1254(1) 1

28 U.S.C. §§ 1331 2

28 U.S.C. §§1332(A) 2

28 U.S.C. §§ 1343(3) 2

42 U.S.C. §§1983 ..... 1, 2

42 U.S.C. §§1988 2

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the First Circuit is recorded at 377 F.3d 52. (See United States Supreme Court Appendix,[1] p. 1a.) The order denying the petition for rehearing and suggestion for rehearing *en banc* was denied on August 31, 2004. (S.C. App., p. 45a.) The opinion of the United States District Court for the District of Rhode Island is recorded at 290 F. Supp. 2d. 215. (S.C. App. p. 13a.)

JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit was entered on July 28, 2004. A petition for rehearing and suggestion for rehearing *en banc* was denied on August 31, 2004. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

RELEVANT PROVISIONS

The primary statute involved is 42 U.S.C. §1983, which is fully set forth in the Appendix attached hereto. In addition, this appeal involves the *Fourth Amendment* to the United States Constitution, which is also fully set forth in the Appendix attached hereto.

---

[1] The Appendix accompanying the instant Brief shall be separately cited and referred to as "S.C. App." Citations to such Appendix shall contain the abbreviation "S.C. App.", followed by numerical/alpha-numerical page numbers.

STATEMENT

Procedural Background

This case was commenced by Richard J. Forest, Nancy Forest and Elizabeth Forest (hereinafter "Petitioner")[2] in the United States District Court for the District of Rhode Island, by filing a Complaint against the Pawtucket Police Department, City of Pawtucket, et. al. (hereinafter "Respondents"), on April 1, 2002. The District Court exercised proper jurisdiction pursuant to 42 U.S.C. §§1983; 42 U.S.C. §§1988; 28 U.S.C. §§ 1343(3) and (4); 28 U.S.C. §§ 1331; 28 U.S.C. §§1332(a); and the Fourth, Fifth and Fourteenth Amendments to the United States Constitution.

The United States District Court entered summary judgment in favor of Respondent on November 14, 2003. On appeal, the United States Court of Appeals for the First Circuit *affirmed* the decision of the District Court on July 28, 2004. (See Forest v. Pawtucket Police Department, 377 F.3d 52 (2004). Subsequently, on August 31, 2004, Petitioner's petition for rehearing and suggestion for rehearing *en banc* was denied.

---

[2] Richard Forest, Nancy Forest and Elizabeth Forest are herein singularly referred to as Petitioner. However, the factual circumstances related herein concern only the consequences that befell Richard Forest.

Statement of Facts

On January 26, 2000, Petitioner voluntarily appeared at the Pawtucket Police Station with his attorney where he was arrested and charged with second-degree sexual assault of student, Jeffrey Montella (hereinafter "Montella"). (See S.C. App., p. 5a.) The Attorney General for the State of Rhode Island subsequently determined the allegation to be wholly unfounded and dismissed the charges. (See Attorney General, "No Information" Face Sheet, Appendix[3] at p. 96.)

Petitioner has been employed by the Pawtucket School Department as a full-time special education teacher at Tolman High School in Pawtucket, Rhode Island, for approximately thirty (30) years. (See S.C. App., p. 3a.) His curriculum includes a "Life Skills" class for students classified by the Pawtucket School Department as having "special needs." (See S.C. App., p. 3a; See November 21, 2002 Deposition of Detective Scott M. Feeley (hereinafter "Deposition I"), App., p. 100, (Deposition I, p. 14, l. 12-25, p. 15, l. 5-6.)

On January 24, 2000, seven (7) students, including Montella, were present in Petitioner's class. Additionally, a teaching assistant, Cheryl Ann Lainhart ("Ms. Lainhart"), was assigned to Petitioner's class and was present in the classroom at all times to assist him, including the date of the aforesaid incident. (See S.C.

---

[3] The Appendix filed with the United States Court of Appeals for the First Circuit shall hereinafter be referred to as "App." All cites to this Appendix will contain the abbreviation "App.", followed by numerical citations only.

App., p. 3a, p. 4a; See App., at p. 103, p. 110, (Deposition I, p. 26, l. 10-17, p. 56, l. 8-12). (See Diagram of Classroom of Classroom, App., p. 142-143.)

At approximately 10:00 A.M., Petitioner reprimanded Montella for arriving late to class. Thereafter, all seven students took their seats. Montella sat in the middle of the room facing all of the other students. (See Tolman High School Witness Statement of Jeffrey Montella, App., p. 90; See Diagram, App., p. 142-143.)

According to Montella, Petitioner approached him and asked where he purchased his new fleece jacket. Montella claimed that, Petitioner, in the presence of the class and Ms. Lainhart, purportedly "slid his hand upward rubbing Montella's penis, until his hand came free, at which time he rubbed the fleece material between his fingers as if he were feeling the texture." (See November 22, 2002, Deposition of Scott M. Feeley (hereinafter "Deposition II"), App., p. 128, p. 134, p. 139 (Deposition II, p. 35, l. 17-25, p. 36, l. 1-6, p. 58, l. 10-12, p. 78, l. 20-24); (See Affidavit in support of Arrest Warrant, App., p. 144-145.) Montella then allegedly exclaimed in the presence of fellow students and Ms. Lainhart, "[w]hoa Buddy." (See Tolman High School Witness Statement of Jeffrey Montella, App., p. 90.)

At some point thereafter, Montella walked out of class and apparently related an alleged incident to Roger Rousselle ("the Principal"). (See S.C. App., p. 2a, p. 3a; See Officer's Narrative Report of Patrolman Dennis R. Smith (herein referred to as "Smith Narrative," App., p. 146.) All of the alleged events,

described above, allegedly occurred in both the presence and earshot of all of the other students and Ms. Lainhart. (See App., p. 128, p. 134 (Deposition II, p. 35, l. 17-25, p. 36, l. 1-6, p. 58, l. 10-12.)) The Principal elected not to take any action at that point in time despite his state statutory obligation to do so if receiving a credible complaint.

At approximately 5:00 P.M., nearly eight hours later, Montella and his mother appeared at the Pawtucket Police Department and met with Patrolman Dennis R. Smith. (See S.C. App., p. 3a; See Officer's Narrative Report of Patrolman Dennis R. Smith (herein referred to as "Smith Narrative," App., p. 146.) Patrolman Smith obtained a written statement from Montella (See S.C. App., p. 3a; See Jeffrey Montella's Police Witness Statement, App., p. 92-93) and transitioned the matter to Defendant Detectives Feeley and Magill (hereinafter referred to as "the Detectives") for further investigation.

The Detectives interviewed Montella for approximately thirty (30) to forty-five (45) minutes. (See App., p. 118 (Deposition II, p.87, l. 4-9.)) Montella was not distraught and he evidenced no objective manifestations as a result of the alleged incident. (See App., p. 139-140 (Deposition II, p. 80, l. 19-21, 24-25, p. 81, l. 1.)) They obtained a "witness" statement from Montella's mother despite the fact that she was not a percipient witness to the alleged incident. (See App., p. 112 (Deposition I, p. 62, l. 4-15.)) (See Gail Montella's Police Witness Statement, App., p. 94-95.) The Detectives purportedly telephoned the Principal, who supposedly informed them that he did not witness, but was aware of, an alleged incident; however, the

Principal opted to interview Montella and his mother the following morning before making any determination as to the legitimacy of Montella's allegation against Petitioner. (See App., p. 130-131 (Deposition II, p. 43, l. 15-18, p. 46, l. 1-4.))

At approximately 8:30 P.M., and prior to seeking an arrest warrant, the Detectives telephoned Petitioner for the purpose of requesting his presence "to interview him" at the police station. (See S.C. App., p. 4a; See App., p. 132 (Deposition II, p. 50, l. 23-25, p. 51 l. 1-3, p.67, l. 2-11.)) They left a message for him on his answering machine "to contact them immediately." (See App., p. 132 (Deposition II, p. 51, l. 1-7.)) At 9:10 P.M., the Detectives successfully contacted Petitioner who agreed to speak to them at the Pawtucket Police Station, at 10:00 P.M. (See App., p. 131-132 (Deposition II, p. 48, l. 19-25, p. 49, l. 1-5.))

The Detectives did not speak with any other witnesses, including those readily available eyewitnesses, to the alleged incident. (See S.C. App., p. 5a; See App., p. 133 (Deposition II, p. 55, l. 16-21.)) Rather, they drafted an Affidavit and Arrest Warrant for Petitioner based upon an alleged violation of R.I.G.L. § 11-37-4, Second Degree Sexual Assault. (See Affidavit in support of Arrest Warrant, App., p. 144-45; See App., p. 136 (Deposition II, p. 68, l. 12-16.)) As such, the Detectives purportedly developed probable cause, based on a single interview of only one individual possessing first-hand knowledge with respect to the alleged incident, namely, Montella. The affidavit, which failed to disclose that the alleged incident took place in plain view of an entire classroom of students and support staff, was offered to Bail Commissioner Ernest

Pratt in the incomplete and misleading aforementioned form, and he signed the same. (See App., p. 136 (Deposition II, p. 68, l. 12-16.))

At 10:00 P.M., Petitioner telephoned the Detectives and advised that, although he was willing to meet with them, he was unable to reach his attorney to appear with him at that time. Petitioner agreed to appear at the Pawtucket Police Station the following morning, and was arrested.

REASONS FOR GRANTING THE PETITION

I. This petition presents the important federal question of how deep must a police investigation extend before there is sufficient probable cause for the arrest of a school teacher accused of sexually molesting a student.[4]

A. Whether Respondents were reasonable in relying **solely** upon an adolescent student's facially unbelievable story that he was allegedly molested in the presence of classmates and staff, to determine that he possessed probable cause.

No reasonable police officer could believe probable cause existed based upon Montella's unreasonable, non-credible, accusation. Petitioner contends that the United States Court of Appeals for the First Circuit (hereinafter the "First Circuit")

---

[4] Indeed, the aforementioned is a direct quote from the Honorable Senior Circuit Judge, Max Rosenn, in his Opinion of July 28, 2004. Forest v. City of Pawtucket, 377 F.3d 52 (2004).

placed undue emphasis on Montella's baseless and facially unbelievable story in holding Respondent's determination of probable cause to be reasonable, thus entitling Respondent to protection *via* qualified immunity. In fact, despite the First Circuit's previous holding that a victim's statement may not, standing alone, necessarily support a finding of probable cause, Menebhi v. Mattos, 183 F.Supp. 2d 490, 500 (D.R.I. 2002), the First Circuit concluded Montella's implausible allegation as sufficient to establish probable cause. This, despite the presence of circumstances that would raise a reasonably prudent officer's antennae, such that the officer should have sought out extrinsic information. See Acosta v. Ames Dept. Stores, Inc., 386 F.3d. 5 (1st Cir. 2004).

Simply put, a victim's statement is not meant to replace or eliminate the need for an investigation. Here there are certain factual circumstances that clearly require more than the mere statement of an alleged victim, namely, the necessity for further investigation of Montella's story that he was grabbed, and vocally acknowledged the same, in the presence of a class of students and support staff, prior to obtaining probable cause. See, B.C.R. Transport Co. v. Fontaine, 727 F.2d 7, 10 (1st Cir. 1984) (no court has ever adopted the *per se* approach).

Recognizing the potential for a situation to arise where, because of specific factual circumstances, it would be impermissible for authorities to blindly rely upon a statement from an alleged victim to establish probable cause, this Court, in B.C.R., adopted a flexible standard, which recognizes a victim's statement will not, *per se*, establish probable cause. Id. In the instant

case, Montella's facially unbelievable complaint is the exact circumstance contemplated by the B.C.R. Court in enunciating its rule.

B. Whether Respondents improperly disregarded the presence of readily available witnesses in determining they possessed probable cause.

To inject credibility and believability to Montella's facially outrageous story, the First Circuit has effectively muted the incredulity of Montella's allegation by improperly focusing its analysis on minute details while disregarding the story's outrageous nature. Specifically, in its Decision, the First Circuit concluded that "the facts known to the detectives at the time of the arrest do not support" the Petitioner's contention that Montella's accusation was inherently unreliable. The First Circuit further stated:

> Montella did not claim that Forest (Petitioner) molested him in clear view of an entire classroom of students.[5] According to the diagram provided by Montella, there were only four other students and a teaching assistant in the class at the time of the incident, and only two of the other students were facing Montella. The others in the

[5] This is incorrect. Montella's Witness Statement to his Principal (See, Witness Statement at App. p. 90) states that Montella "was in class and all the class students sat down and [Montella] sat facing the middle of the room." Simply put, it is difficult to ascertain how one can be more "in plain view" or "in full view" than when he/she is amongst all of his/her classmates and is sitting in the middle of a classroom.

> room were situated to Montella's side where they would not necessarily have had a clear view.

(See, S.C. App., p. 9a.)

The fact that the First Circuit concluded that others present in the classroom at the time of the alleged incident may not have necessarily had a clear view is irrelevant to the analysis of whether Respondents acted reasonably. In other words, what witnesses may have **actually** seen, **or been able to see**, is of no import to a determination of whether Respondents acted on probable cause. The only issue is whether witnesses were readily available.

Montella's diagram should have been evaluated strictly for the purpose of confirming that others were present at the time of the alleged incident. The First Circuit improperly concluded that the officers were aware and took into account only two students were facing Montella at the time of the alleged incident. It is quite possible that those who the First Circuit concluded may not have been "**necessarily**" able to see the incident, may have, in fact, seen the same. Leaping to such speculative conclusions, however, without questioning the readily available witnesses, is and/or would be error. Nevertheless, the First Circuit, like Respondents, did the same, justifying to interview witnesses by speculating that the information such witnesses **would** have provided would have been of no assistance. Such reasoning misses the mark because the only relevant inquiry is whether witnesses were readily available and **could** have provided information,

regardless of the ultimate substance, if any, such information.

The fact that Respondents knew of the presence of **any** witnesses in the classroom, irrespective of what each witness may have actually seen, imposed a duty on the part of Respondents to inquire of such readily available witnesses as any reasonable police officer would have so inquired. Such unmitigated acceptance by Respondents of this facially implausible story, where an adolescent claims he was molested in the presence of a classroom of students, a teaching assistant, and while audibly voicing[6] his displeasure is improper, for any reasonable police officer would have, and should have, sought out additional information to clarify the circumstances of the alleged incident.

The First Circuit also erred in failing to consider and afford appropriate weight to the testimony of Detective Scott M. Feeley (hereinafter "Detective Feeley") on this issue. Detective Feeley testified that, "Unfortunately, child molestation is not a spectator sport, so its usually one victim, and that's the witness." (See App. P. 125 (Deposition II, p. 23, l. 21-25)). Detective Feeley admitted, however, that if the alleged molestation occurred in an area occupied by others in which the molestation could be a "spectator sport," he would certainly speak with those present at the time of the alleged incident prior to determining if probable cause existed. (See App., p. 125-126 (Deposition II, p. 23, l 24-25, p. 24, l. 1-25, p. 25, l. 1-4.)) Detective Feeley admitted that Respondents' practice is to follow up

---

[6] See infra., Argument "D."

with readily available information[7] and that in a situation where an alleged molestation occurred in front of others he would certainly "speak with those present at the time of the alleged incident prior to determining if probable cause existed." Such was the case here.

Importantly, every Federal Circuit Court confronted by a factually analogous scenario where officers ignore readily available evidence has determined that officers exhibiting such conduct are not entitled to the protection afforded by qualified immunity. The First Circuit expressly recognizes the seminal case of Bevier v. Hucal, 806 F.2d 123 (7th Cir. 1986), where the Court held that an officer who ignores basic, readily available evidence is not entitled to qualified immunity. See Holland v. City of Portland, 102 F.3d 6, 9 (1st Cir. 1996); Rodriguez v. Comas, 888 F. 2d 899, 902 (1st Cir. 1989). In Bevier, the issue before the Court was whether a police officer had probable cause to arrest and detain the plaintiffs.[8]

The plaintiffs were husband and wife who employed a teen-aged girl to baby-sit their two children

---

[7] (See App., p. 15, l. 20-25, p. 16, l. 1-8).

[8] Probable cause can only exist when the facts and circumstances within the arresting officer's knowledge, and of which he has reasonably trustworthy information, are sufficient to warrant a person of reasonable caution and prudence in the belief that the defendant is committing or has committed a crime. Floyd v. Farrell, 765 F.2d 1, 5 (1st Cir. 1985). In other words, an officer must demonstrate that he or she had objectively reasonable grounds for obtaining an arrest warrant – that a reasonably competent police officer could have believed that probable cause existed to effectuate an arrest. Ricci v. Urso, 974 F.2d 5,6 (1st Cir. 1992).

while they worked. Bevier, 806 F.2d at 124. During the aforesaid babysitting, a police officer observed the two young children, who appeared listless. The officer approached the babysitter who advised him that she was watching the children. She showed him a diaper rash on one of the children, and without further inquiry, he allowed her to leave. Id. at 125.

The officer contacted an ambulance and arranged for the children to be transported for treatment. Thereafter, the father arrived home, contemporaneous with the ambulance. Upon identifying himself to the officer, the father was placed under arrest. The officer made no inquiry of the father. Similarly, when the mother arrived at the police station, she was immediately placed under arrest without any questioning by the officer. Id.

In affirming the District Court, the Seventh Circuit held that the arresting officer acted unreasonably, possessed no probable and was therefore not insulated by the doctrine of qualified immunity. The Court held that the officer lacked probable cause because he failed to question the parents, Red-Cross personnel, or the teen-aged girl babysitting the children. Id. at 127. The Court stated:

> [a] police officer may not close his or her eyes to facts that would help clarify the circumstances of an arrest. Reasonable avenues of investigation must be pursued especially when, as here, it is unclear whether a crime had ever taken place.

Id.

In concluding that the officer acted unreasonably, the Court reasoned that he had "at least four sources of information available to him; he simply chose not to ask anything of anyone." (emphasis added.) Id. at 128. Because the information could have been easily obtained, and was necessary to consider prior to making a probable cause determination that the parents had intentionally neglected their children, the officer acted unreasonably in failing to make those inquiries. Id.; See also Moore v. The Marketplace Restaurant, Inc., 754 F.2d 1336, 1347 (7th Cir. 1985) (holding that officers failed to conduct reasonable investigation when they arrested the plaintiffs solely on an allegation by a restaurant manager that plaintiffs had refused to pay for their meal).[9]

Here, the First Circuit distinguished the instant case from Bevier by concluding that Respondents conducted a reasonable investigation because they interviewed Montella and learned that he related a version of his story to both his mother and the Principal. This is incorrect. The following is a factual "snapshot", known to Respondents at the moment they purportedly developed probable cause:

- Montella complained that Petitioner grabbed his penis in the presence of a classroom of students and a staff member.

---

[9] The Moore Court reasoned that, "[a]rmed with one side of the story, the officers [unreasonably] hurried to arrest plaintiffs who showed no signs of fleeing" and had they "used reasonable judgment and conducted a proper investigation," the plaintiffs' rights could have been preserved. Id.

- Montella relayed a version of the story to his mother and the Principal.
- Montella was a "special needs" student.
- Montella was taking a prescribed medication, of which Respondents had no knowledge as to its side-effects on Montella.
- Readily available witnesses were present at the time of the alleged incident and were available before and after Montella was interviewed.
- The Principal, although obligated pursuant to state law to report credible allegations of abuse, opted to schedule an interview the following morning with Montella and his mother, rather than report the alleged incident.
- Montella allegedly exclaimed, "Whoa Buddy!" at the time of the incident in the presence of the staff member and other students.
- Montella exhibited neither signs of emotional distress nor objective manifestations of abuse.

Simply put, Respondents awareness of the aforementioned facts underscores their unreasonableness in accepting Montella's non-credible version of the story in their haste to effectuate Petitioner's arrest. They ignored basic, readily available evidence and willfully disregarded their lack of knowledge about the effects the disability and prescription drug may, or could have, had on Montella's credibility. Had the information highlighted by the

First Circuit (i.e. Montella's allegation along with knowledge that a similar statement had been relayed to his mother and Principal) been the only facts of which the Respondents were aware, their conduct may have been more reasonable. Armed with the entire set of aforementioned facts, however, Respondents' probable cause determination cannot pass muster. Respondents unreasonably deviated from their normal practice and admitted the same. (See App., p. 125 (Deposition II, p. 23, l. 24-25, p. 24, l. 1-25, p. 25, l. 1-4.)) As such, Respondents must not be insulated from liability.

C. Whether it was improper for the United States Court of Appeals for the First Circuit to develop and substitute its own conclusion that an adolescent student's learning disability and medication prescribed for such disability did not affect the adolescent's credibility, despite the fact that the police officer admitted having no knowledge about whether either the disability or medication prescribed affected the complainant's trustworthiness.

In short, the First Circuit stated as follows, "[b]ut there is no evidence that Montella's condition of Attention Deficit and Hyperactivity Disorder (hereinafter "ADHD"), and his prescription of Ritalin, had any affect on his credibility." (See, S.C.App., P. 9a.) Such rationale is flawed. In relying upon the absence of any "evidence" that Montella's condition affected his credibility, the First Circuit misapprehended the utility and importance of Respondents' appreciation of the fact that Montella was affected by a condition and taking

prescribed medication, yet did not know the symptoms associated such condition nor the side effects of such medication. The wholesale void of any knowledge whatsoever regarding Montella's condition and/or side effects of his prescribed medication is ample evidence that Respondents acted unreasonably in relying solely upon Montella's uncorroborated, facially unbelievable story.

It strains credulity to argue that Respondents were able to make an accurate credibility determination of Montella despite their knowledge that he was affected by a condition of which they had no knowledge. In fact, Detective Feeley admitted in his deposition that he had no idea of the side effects of Ritalin and/or how ingestion of the same may have affected Montella. (See, App., p. 121 (Deposition II, p. 5, l. 12-16)).

Moreover, it is irrelevant that ADHD and/or Ritalin may or may not actually affect credibility.[10] Rather, the issue lies with Respondents' assessment of credibility at the very moment probable cause was supposedly realized. In short, Respondents possessed absolutely no knowledge of the affects of ADHD or the medication Ritalin. As such, any affiance by Respondents as to Montella's credibility is wholly void,

---

[10] Thus, the fact that the record contains no evidence regarding the effect, if any, ADHD or Ritalin may have on credibility is irrelevant to the analysis of whether Respondents possessed probable cause. In fact, as discussed herein, the absence of any information available to, or knowledge on the part of, Respondents as to the effects of ADHD or Ritalin further underscores the argument that Respondents were wholly unqualified to determine Montella's credibility.

undermines the supposed "credibility" of Montella's allegation and, consequently, Respondents' assertion that they possessed probable cause.

D. Whether Respondents were unreasonable in failing to interview readily available witnesses about an adolescent complainant's allegation of molestation, despite the complainant's contention that he blurted out an exclamatory statement at the time of the alleged incident, in the presence of other students and staff.

Several reasons exist to demonstrate the outrageousness of Montella's story and, as such, to doubt the reliability of Montella. Montella was a special needs student prescribed Ritalin for ADHD. Montella was a student whom Petitioner reprimanded for being late to class. Montella alleged he was molested in the presence of other students and support staff. Montella claimed he was molested while sitting in the middle of the classroom. Finally, and most unbelievably, Montella alleged that he exclaimed "[w]hoa buddy," within earshot of all individuals present in the classroom.

Notwithstanding, the First Circuit concluded that because Montella alleged Petitioner was touching his jacket when this occurred, it was reasonable for the detectives to conclude an eyewitness would not **necessarily** have recognized any inappropriate touching. Conveniently, however, the First Circuit ignores the important fact that Montella, in front of the entire class, allegedly exclaimed "[w]hoa buddy!" Seemingly, such utterance flies in the face of the First

Circuit's intimation that Respondents could have believed the incident to be more localized and private in nature. Moreover, any reasonable police officer, upon hearing such an outrageous story and learning of the fact that the alleged victim made an exclamatory comment in the presence of witnesses, would have followed-up on the validity of such allegation by interviewing those readily available witnesses.

E. Whether Respondents acted unreasonably in omitting crucial facts from the affidavit in support of an arrest warrant including, but not limited to, that the incident allegedly occurred openly in the presence of students and staff who were not questioned about the truthfulness of the allegation.

The First Circuit held that Respondents' failure to include, in the affidavit for arrest warrant, the fact that Montella alleged he was molested in the presence of the entire class was harmless, since only two of the students were facing Montella and it was possible that not all the witnesses would have been able to see the alleged incident. As explained *supra*, what an eyewitness may, or may not have, been able to see is immaterial. The First Circuit should not have substituted its judgment, *ex post facto*, to promote the "reasonableness" of Respondents conduct. Respondents' never indicated, at any point, that they were aware of only two desks facing Montella or that they reasoned some of the students would not have been able to see the alleged incident. Therefore, since these facts and/or deductions were never present in the minds of Respondents at the time they purportedly

developed probable cause, such conclusions should not have been read into the record by the First Circuit.

Where an officer knows, or has reason to know, that he has materially misled a magistrate on the basis for a finding of probable cause, as where a material omission is intended to enhance the contents of the affidavit as support for a conclusion of probable cause, the shield of qualified immunity is lost. See generally Malley v. Briggs, 475 U.S. 335 (1986)[11] "[A]n omission is made with reckless disregard where the officer leaves out anything that a reasonable person would have known was the kind of matter that the judge would want to know in determining whether probable cause exists for the arrest." Menebhi v. Mattos, 183 F.Supp.2d 490, 502 (D. R.I. 2002).

In the case at bar, there are numerous material omissions from the Detectives affidavit. The result was a self-serving "snapshot" that misled the Magistrate to believe that the alleged incident took place in an isolated area between only Montella and Petitioner, as opposed to the "spectator sport" that, in fact, allegedly occurred in the presence of several readily available witnesses. Respondents knew, or should have known that such facts, namely, that the incident occurred in

---

[11] Said proposition is set forth in the case of Franks v. Delaware, 438 U.S. 154 (1978), where this Court held that a police officer's deliberate or reckless inclusion of false or misleading statements in a warrant application or affidavit requires that evidence seized be suppressed. Notably, many jurisdictions, including Rhode Island, recognize that the Franks doctrine extends to material omissions as well as affirmative falsehoods. See State v. DeMagistris, 714 A.2d 567, 575 (R.I. 1998).

front of the entire class and Ms. Lainhart, would be material facts that *should* have been presented to the Magistrate, and that the Magistrate would have relied upon them in determining whether to issue an arrest warrant. Respondents deliberately omitted those facts and misled the Magistrate to believe that the purported act was a "broom-closet" scenario (i.e. in the corner of the classroom or an isolated area). In contrast, this is clearly not a case where only the alleged victim and perpetrator were witnesses to the purported incident. Such deliberate omissions could only have been intended to mislead the Magistrate in issuing an arrest warrant.

CONCLUSION

For the foregoing reasons, this petition should be granted.

Respectfully submitted,

Petitioners,
By their Attorneys,
LaPlante & Sowa, Ltd.,
Jeffrey D. Sowa, Esq.
67 Cedar Street, Suite 102
Providence, RI 02903
TEL: (401) 273-0200
FAX: (401) 273-0250

(any footnotes trail end of each document)

No. 03-2652

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RICHARD J. FOREST; NANCY FOREST; ELIZABETH FOREST,

Plaintiffs - Appellants

v.

PAWTUCKET POLICE DEPARTMENT; CITY OF PAWTUCKET, by and through its Treasurer, Ronald Wunschel; SCOTT M. FEELEY, in his individual and official capacity; JOHN CLARKSON, in his individual and official capacity; GEORGE L. KELLEY, in his individual and official capacity; DENNIS SMITH, in his individual and official capacity; WILLIAM MAGILL, in his individual and official capacity;

Defendants - Appellees;

JEFFREY T. MONTELLA; GAIL MONTELLA, individually and as parent/legal guardian of Jeffrey T. Montella; CHARLES MONTELLA,

Defendants

July 28, 2004, Decided

COUNSEL: Jeffrey D. Sowa was on brief for appellant.

Marc DeSisto was on brief for appellee.

JUDGES: Before Torruella, Circuit Judge, Rosenn, Senior Circuit Judge, * Howard, Circuit Judge.

OPINIONBY: ROSENN

OPINION: ROSENN, Senior Circuit Judge. This appeal presents an important, although not infrequent, question arising out of the delicate relationship between a teacher and student in the public school system. The question is: how deep must a police investigation extend before there is sufficient probable cause for the arrest of a school teacher accused of sexually molesting a student? At stake is the professional career and reputation of a high school teacher on one hand, and on the other the safety, health, and moral values of the student. Caught between the two are the police officers called to investigate and, if warranted, to arrest for prosecution.

A fifteen-year-old male student complained to his high school principal that his special education teacher had sexually molested him while in class. The complaint led to an investigation and the arrest of the teacher by the Pawtucket, Rhode Island, Police Department. The charge against the teacher, Richard Forest ("Forest"), a Massachusetts resident, was ultimately dismissed by the state court. Forest thereupon brought a civil suit under 42 U.S.C. § 1983 in the United States District Court for the District of Rhode Island against the City of Pawtucket, the Police Department, and individual officers, claiming a violation of his Fourth Amendment

rights under the Federal Constitution.[1] The District Court found that the police officers had reasonable probable cause to arrest Forest and granted summary judgment in their favor. Forest timely appealed. We affirm.

I.

Forest had been employed by the Pawtucket School District in Rhode Island as a full-time special education teacher at Tolman High School for 30 years. At the time of the events relevant to this case, he taught a "life skills" course for special needs children. Jeffrey Montella ("Montella"), one of his students, left Forest's classroom on January 24, 2000, and went to the principal's office to report an incident of misconduct. Montella informed Principal Rousselle ("Rousselle") that Forest touched him inappropriately in a sexual manner during class. Montella provided a written statement to Rousselle detailing the incident.

At approximately 5 p.m. that evening, Montella and his mother, Gail Montella, went to the Pawtucket Police Department and filed a complaint against Forest. Montella gave Officer Dennis Smith a written statement alleging that Forest "grabbed and rubbed [his] penis during class." Montella also disclosed that Forest had rubbed his shoulders and legs in the past, in a way that made him uncomfortable.

Officer Smith referred the complaint to Detectives Scott Feeley and William Magill, who reinterviewed Montella and his mother on that same evening. During the second interview, Montella drew a diagram depicting the seating arrangement in the class at the

time of the alleged incident. The diagram shows that when the misconduct allegedly occurred, there were four other students in the classroom, two sitting beside Montella and two sitting across the room facing him. A teaching assistant, Cheryl Ann Lainhart, was seated a short distance to the left of the row occupied by Montella and his two fellow students.

Gail Montella also provided a written statement to the detectives. She affirmed that her son told her about the inappropriate touching that occurred earlier in the day, and that her son had complained in the past about Forest rubbing his shoulders and thigh. Ms. Montella explained that when her son originally complained of inappropriate touching, she did not believe it to be significant because she assumed that Forest was simply being nice to her son. She also assumed that Forest's attention to Montella was not out of the ordinary, as Forest had been generous with the Montella family in the past, giving them a large bag of gifts at Christmas and a $ 50 gift certificate to a grocery store. Ms. Montella explained in her statement that she believed her son's story about the alleged misconduct in the classroom because Forest had always been nice to her family, and therefore her son had no reason to lie in order to harm him.

Detectives Feeley and Magill interviewed Principal Rousselle on the same evening of the complaint. Rousselle confirmed that Montella had come to his office during class that day, made an oral complaint, and provided a written statement regarding the incident. After confirming the incident with Rousselle, the detectives called Forest at 8:30 p.m., leaving a message on his answering machine, and again at 9:10 p.m., when

they reached Forest on the phone. The detectives asked Forest to come to the police station, but Forest declined because he could not reach his attorney. At 10 p.m., after speaking with his attorney, Forest called the detectives and agreed to voluntarily appear at the police station. On January 26, 2000, Forest was arrested and charged with second degree sexual assault.

Detective Feeley prepared the affidavit in support of the arrest warrant on the evening of January 24, after he received the complaint from Montella, verified the incident with Montella's mother, and confirmed the incident with Principal Rousselle. Feeley did not interview Forest, the teaching assistant, or any other students present in the classroom at the time of the alleged incident. But, Feeley stated that he found Montella's claim to be credible.

The affidavit in support of the arrest warrant recounted Montella's story, explaining that Forest asked Montella about his new fleece jacket, and allegedly rubbed Montella's penis while he reached upward to feel the jacket material. Feeley did not include in the affidavit an explanation that Montella was a special needs student taking Ritalin for his Attention Deficit Hyperactivity Disorder, nor did he indicate that there were other students in the classroom during the alleged incident who may have witnessed the event. Bail Commissioner Ernest Pratt reviewed the affidavit, found probable cause to arrest Forest, and signed the warrant.

The Pawtucket School Department investigated Montella's allegation and found that "there was no credible evidence presented that Jeffrey Montella was

fondled sexually by Richard Forest in the Life Skills Class." Subsequently, the Rhode Island Attorney General's office declined to prosecute, and the Rhode Island state district court dismissed the case.

After the charges were dismissed, Forest brought suit raising eleven counts against multiple defendants. n2 Counts I through VII, which included claims brought under the Fourth and Fifth Amendments plus multiple state law claims, were raised against the city, the police department, and several officers involved ("Pawtucket Defendants"). Counts VIII through XI included state law claims raised against Montella and his family members ("Montella Defendants"). Only the Pawtucket Defendants filed a motion for summary judgment, which was granted by the District Court. Therefore, counts VIII through XI involving the Montella Defendants were not considered on summary judgment before the District Court, and are not now before this court on appeal. Furthermore, Forest only appeals the District Court's grant of summary judgment on Count I involving the alleged violation of his Fourth Amendment rights. Our review is limited to this single issue.

II.

Forest's Fourth Amendment claim asserts that his constitutional rights were violated because he was arrested without probable cause. The District Court granted summary judgment on this claim based on two separate, but related grounds. First, the District Court found that the detectives had probable cause to arrest Forest, and thus there was no constitutional violation. The Pawtucket Defendants were therefore entitled to

qualified immunity. Second, the Court's finding of no constitutional violation also justified summary judgment on the merits of the § 1983 claim. See *Morales v. Ramirez*, 906 F.2d 784, 787 (1st Cir. 1990) (explaining that although qualified immunity and the merits of § 1983 suit are separate inquiries, a finding of no constitutional violation may resolve both).

We review the District Court's grant of summary judgment *de novo*. *Grant's Dairy-Maine LLC v. Comm'r of Maine Dept. of Agric., Food and Rural Res.*, 232 F.3d 8, 14 (1st Cir. 2000). We review all evidence in the light most favorable to the nonmoving party, and will affirm if we conclude that there are no issues of material fact, and the Appellees deserve judgment as a matter of law. Fed. R. Civ. P. 56(c); *Morrissey v. Boston Five Cents Savings Bank*, 54 F.3d 27, 31 (1st Cir. 1995).

III.

Qualified immunity is not a defense on the merits, but is "an entitlement not to stand trial or face the other burdens of litigation." *Saucier v. Katz*, 533 U.S. 194, 200, 150 L. Ed. 2d 272, 121 S. Ct. 2151 (2001) (citation omitted). Consequently, it is important to resolve the immunity question as early as possible in the litigation. Id. at 201. Government officials will not be entitled to qualified immunity if their conduct violated a statutory or constitutional right that is "clearly established." Id. Thus, the first threshold inquiry must be whether the facts, taken in the light most favorable to the party claiming injury, show that an officer's conduct violated a statutory or constitutional right. If the facts do not support the violation of a right, then the inquiry ends at that point, and the court does not proceed to the second

question of whether the right allegedly violated was clearly established. Id.

Probable cause analysis requires inquiry into the facts and circumstances within the arresting officer's knowledge at the time of arrest to determine if a person of "reasonable caution and prudence" would have believed that the defendant committed a crime. *Floyd v. Farrell*, 765 F.2d 1, 5 (1st Cir. 1985). It does not require evidence to prove guilt beyond a reasonable doubt. "Probable cause need not be tantamount to proof beyond a reasonable doubt . . . . Probability is the touchstone." *U.S. v. Grant*, 218 F.3d 72, 75 (1st Cir. 2000) (citation omitted). "The probable cause standard does not require the officers' conclusion to be ironclad, or even highly probable. Their conclusion that probable cause exists need only be reasonable." *U.S. v. Winchenbach*, 197 F.3d 548, 555-56 (1st Cir. 1999).

This court has affirmed that police officers can justifiably rely upon the credible complaint by a victim to support a finding of probable cause. *B.C.R. Transport Co., Inc. v. Fontaine*, 727 F.2d 7, 10 (1st Cir. 1984) (noting that although not a per se rule, a probable cause determination predicated on information furnished by the victim is generally considered reliable). Therefore, the primary inquiry in this case is whether there is any evidence that the officers acted unreasonably when they determined that Montella's accusation was credible, in light of all the circumstances known at the time.

Forest argues that the accusation was inherently unreliable because Montella alleged that the incident occurred in front of an entire classroom of students and

a teaching aide, none of whom were interviewed prior to the arrest. However, the facts known to the detectives at the time of arrest do not support this conclusion. Montella did not claim that Forest molested him in clear view of an entire classroom of students. According to the diagram provided by Montella, there were only four other students and a teaching assistant in the class at the time of the incident, and only two of the other students were facing Montella. The others in the room were situated to Montella's side where they would not necessarily have had a clear view. Also, Montella explained that Forest was commenting on, and touching Montella's jacket when the alleged molestation occurred. Therefore, it was reasonable for the detectives to conclude that even an eye witness would not necessarily have recognized any inappropriate touching.

Forest also argues that because Montella was a special needs student, his credibility should have been questioned. But there is no evidence that Montella's condition of Attention Deficit and Hyperactivity Disorder, and his prescription of Ritalin, had any effect on his credibility. Rather, Detective Feeley believed that Montella was not mentally incapacitated in any relevant manner, and made an independent determination that Montella was "fairly intelligent and credible."

Finally, Forest argues that under *Be Vier v. Hucal*, 806 F.2d 123 (7th Cir. 1986), the officers were required to interview readily available witnesses before seeking an arrest warrant. However, Bevier does not support Forest's argument. In Bevier, the police arrested two parents for child abuse with absolutely no investigation

or evidence supporting the abuse, even though witnesses who could have been consulted were readily available. Id. at 128. In this case, the police did conduct an investigation. The detectives interviewed Montella twice to ascertain his primary accusation, interviewed his mother to verify the account and learn that Montella had complained in the past of inappropriate touching, and confirmed the events with Principal Rousselle. All of the information gleaned from these interviews and statements provided reasonable evidence to support probable cause.

Forest asserts that the officers should have interviewed the other students in the classroom and the teaching assistant before seeking the arrest warrant. However, the law is clear that once police officers are presented with probable cause to support an arrest, no further investigation is required at that point. See, e.g., *Brodnicki v. City of Omaha*, 75 F.3d 1261, 1264 (8th Cir. 1996) (noting that officers are not required to conduct mini-trials before arrest).

We agree with the District Court that probable cause existed to arrest Forest. Therefore, there was no violation of Forest's Fourth Amendment rights, and the Pawtucket Defendants are entitled to qualified immunity.

IV.

Forest argues in the alternative that the Pawtucket Police exaggerated the evidence presented in the arrest warrant knowing that Montella's claim was not credible. A Fourth Amendment violation may be established if a defendant can show that officers acted

in reckless disregard, with a "high degree of awareness of [the statements'] probable falsity." *Wilson v. Russo*, 212 F.3d 781, 788 (3d Cir. 2000) (citation omitted). Forest asserts that the officers acted with reckless disregard because they relied on witnesses who were not present during the incident (i.e. Montella's mother and Principal Rousselle), and because the officers added information about Forest's gift giving to the Montella family, which was speculative and irrelevant.

We believe that Forest's claim of reckless disregard must fail. First, the detectives did not rely on the statements of Montella's mother and Principal Rousselle to verify the account of the alleged assault in the classroom. Rather, the detectives relied on those statements to confirm (1) that Montella actually left the classroom and went straight to the principal's office to report the incident, and (2) that Montella had complained of inappropriate touching by Forest in the past. Both of these items were relevant to a finding of probable cause. Second, the inclusion of Forest's generosity towards the Montellas in the past was relevant when considered in the context explained by Montella's mother. Gail Montella stated that she believed her son's claim because he had no reason to harbor any ill will towards Forest; Forest had been kind to the Montellas in the past. Therefore, the inclusion of this fact directly supports Montella's credibility.

Forest also argues that the officers omitted crucial facts from the affidavit, particularly that the alleged assault took place in front of the entire class and the teaching assistant. Yet, as explained above, Forest's assertion that the incident took place in front of the entire class is

an overstatement. The entire class consisted of only five students including Montella, and only two of the students were facing Montella at the time of the alleged incident. Additionally, Montella alleged that the touching took place under the pretense of Forest's feeling his jacket, so under this scenario, even an eye witness may not have realized what was occurring. Therefore, the officer's omission of these facts from the affidavit was not misleading, and there is no basis for the claim of reckless disregard.

V.

For the reasons set forth above, the District Court's grant of summary judgment is affirmed. Each party is to bear its own cost.

Footnotes

* Of the United States Court of Appeals for the Third Circuit, sitting by designation.

n1 The pertinent language of the Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation."

n2 The District Court maintained jurisdiction over the original federal claims pursuant to 28 U.S.C. § 1331, and over the state law claims pursuant to diversity jurisdiction, 28 U.S.C. § 1332(a). This court has jurisdiction over an appeal of the District Court's grant of summary judgment under 28 U.S.C. § 1291.

C.A. 02-164-L

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND

RICHARD J. FOREST; NANCY FOREST; AND ELIZABETH FOREST,
Plaintiffs,

v.

PAWTUCKET POLICE DEPARTMENT; CITY OF PAWTUCKET, BY AND THROUGH ITS TREASURER, RONALD WUNSCHEL; JOHN CLARKSON, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY; SCOTT M. FEELEY, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY; GEORGE L. KELLY, III, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY; WILLIAM MAGILL, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY; DENNIS SMITH, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY; JOHN DOE I[1], IN HIS INDIVIDUAL AND OFFICIAL CAPACITY; JEFFREY T. MONTELLA, ALIAS; GAIL MONTELLA, ALIAS, INDIVIDUALLY AND AS PARENT AND/OR LEGAL GUARDIAN OF JEFFREY T. MONTELLA, ALIAS; CHARLES T. MONTELLA, INDIVIDUALLY AND AS PARENT AND/OR LEGAL GUARDIAN OF JEFFREY T. MONTELLA, ALIAS,
Defendants.

October 22, 2003, Decided

COUNSEL: For PLAINTIFF: Jeffrey D. Sowa, Esq., Correra, LaPlante, Dayian & Sowa, Providence, RI.

For DEFENDANT: Marc DeSisto, Esq., Providence, RI.

Charles Montella, DEFENDANT, Pro se, Providence, RI.

JUDGES: Ronald R. Lagueux, Senior United States District Judge.

OPINIONBY: Ronald R. Lagueux

OPINION:

OPINION AND ORDER

Ronald R. Lagueux, Senior United States District Judge,

Plaintiffs, Richard, Nancy and Elizabeth Forest, present this Court with a multi-count complaint against two sets of defendants. The first set of defendants includes the Pawtucket Police Department, the City of Pawtucket, John Clarkson, Scott M. Feeley, George L. Kelly, III, William Magill, and Dennis Smith ("the Pawtucket Defendants"). The second set of defendants includes Jeffrey T. Montella, Gail Montella, and Charles Montella, ("the Montella Defendants"). Plaintiffs claim that this Court has jurisdiction based on their assertion of a federal question and diversity of citizenship.

Plaintiffs' Complaint contains eleven counts. In Count I, Plaintiff[2], Richard Forest, ("Forest") alleges that the Pawtucket Defendants violated the *Fourth*

Amendment to the United States Constitution by arresting him without probable cause. Count II alleges that the Pawtucket Defendants violated the *Fifth Amendment* by engaging in arbitrary and capricious conduct, decision-making, and policy. In Count III, Forest makes a state law claim for intentional infliction of emotional distress. While the Complaint is unclear as to whether this Count relates to the Pawtucket or Montella Defendants, this Court assumes that the Complaint refers to the Pawtucket Defendants. Count IV alleges negligence by the Pawtucket Defendants. Count V includes a claim for malicious prosecution against the Pawtucket Defendants. In Count VI, Plaintiffs Nancy and Elizabeth Forest allege that the Pawtucket Defendants' conduct caused them to suffer a loss of consortium. Count VII[3] presents a claim for punitive damages against all Defendants. Counts VIII through XI present state law claims for negligence, defamation, abuse of process, and interference with contract relations respectively against the Montella Defendants.

Forest's main thrust is against the Pawtucket Defendants utilizing *42 U.S.C. § 1983*. He argues that the Pawtucket Defendants violated his rights under the *Fourth* and *Fifth Amendments to the United States Constitution* by arresting him without probable cause. This matter is before the Court on the Pawtucket Defendants' motion for summary judgment. They contend that they did not violate Forest's constitutional rights because they arrested Forest pursuant to an arrest warrant based on probable cause. Alternatively, the Pawtucket Defendants argue that there is no liability on their part because of the doctrine of qualified immunity.

This Court is persuaded by both of these arguments. The Pawtucket Defendants did not violate Forest's rights under the *Fourth* or *Fifth Amendments* because they conducted an adequate investigation and secured an arrest warrant based on probable cause. In addition, the doctrine of qualified immunity shields them from suit on Forest's *§ 1983* claims. Therefore, this Court grants the Pawtucket Defendants' motion for summary judgment on all counts against them (Counts I-VII). The Court expresses no opinion on the viability of the state law claims asserted against the Montella Defendants because they did not file a motion for summary judgment.

1. Background and Procedural History

In considering a motion for summary judgment, the Court must view the evidence in the light most favorable to the nonmoving party. See *Springfield Terminal Ry. Co. v. Canadian Pac. Ltd., 133 F.3d 103, 106 (1st Cir. 1997)*. Therefore, this writer presents the following factual recitation with the above rule in mind.

Forest is a Massachusetts resident who works for the Pawtucket School Department. He is a full-time special education teacher at Tolman High School and has held this position for approximately thirty years. He teaches a "Life Skills" class for children with special needs.

The City of Pawtucket Police Department employs Defendants, Scott M. Feeley, Dennis R. Smith, William Magill, and John Clarkson, who act as agents, servants, and employees of the City of Pawtucket as police officers. Forest sues each officer individually and in his official capacity. Defendant, George L. Kelly III was

the Chief of the Pawtucket Police Department and acted in that capacity at the time of this incident. The City of Pawtucket is a municipal corporation within the State of Rhode Island and employs the afformentioned defendants.

On January 24, 2000, the date of the incident at issue, there were seven students enrolled in Forest's Life Skills class. One student, Defendant Jeffrey Montella ("Jeffrey"), is the complaining witness in this case. Cheryl Ann Lainhart, a teaching assistant assigned to Forest's class, was also present on this date.

Jeffrey was fifteen years old and a Rhode Island resident at the time of the alleged incident. On January 24, 2000, Jeffrey left Forest's classroom and went to the school principal's office. Jeffrey told Principal Rousselle, that Forest had touched him inappropriately during class. At Rousselle's request, Jeffrey provided a written statement detailing the incident.

At about 5:00 p.m. that evening, Jeffrey and his mother, Defendant Gail Montella, went to the Pawtucket Police Department and filed a formal complaint against Forest. The two spoke with Defendant, Officer Dennis R. Smith. Jeffrey gave Officer Smith a written statement saying that Forest grabbed and rubbed Jeffrey's penis during class. Jeffrey also stated that Forest had previously touched him by rubbing his shoulders and legs. Jeffrey's mother witnessed this statement.

Jeffrey's complaint was then referred to Detectives Scott M. Feeley and William Magill. They re-interviewed Jeffrey and his mother on January 24, 2000. During this interview, Jeffrey drew a diagram depicting himself seated facing the class at the time of

the incident. Gail Montella also gave the detectives a written statement affirming that Jeffrey told her Forest inappropriately touched him during class and complained about Forest previously rubbing his shoulders. She also stated that Forest had given gifts to the family on a prior occasion.

Detectives Feeley and Magill also interviewed Principal Rousselle on January 24, 2000. Although he did not witness Forest touching Jeffrey, Rouselle confirmed that Jeffrey had made an oral complaint and given a written statement regarding the incident. The detectives attempted to contact Forest and left a message on his answering machine at about 8:30 that evening. The detectives reached Forest at about 9:10 p.m. and asked him to come to the police station. Forest declined because he was unable to reach his attorney. At about 10:00 p.m., and after speaking with his attorney, Forest called the detectives to say he would come to the station the next morning.

After receiving Jeffrey's complaint and verifying it with Jeffrey's mother and Principal Rousselle, Detective Feeley prepared an affidavit in support of an arrest warrant. Detective Feeley did not interview Forest, teaching assistant Lainhart, or the other students present at the time of the incident prior to preparing the arrest warrant application. Detective Feeley's affidavit asserted that Jeffrey stated that he was at Toleman High School when Forest asked him where he got his new fleece jacket. Jeffrey responded that his mom had bought it for him. The affidavit states that according to Jeffrey, Forest reached between Jeffrey's legs and grabbed Jeffrey's penis and then Forest slid his hand upward rubbing Jeffrey's penis until Forest's hand came off at which time Forest

rubbed the fleece material between his fingers. Jeffrey immediately left the classroom and went to tell Principal Rouselle what had happened. The affidavit notes that Jeffrey made an identical complaint to his mother.

Detective Feeley also included the fact that Jeffrey had made previous complaints to his mother about Forest. Jeffrey had complained that Forest rubbed his shoulders on one occasion and Jeffrey's upper thigh on another. The affidavit also states that Mrs. Montella did not pursue these complaints because she thought Forest was just being nice to Jeffrey and that Forest had previously given the Montellas a large bag of Christmas gifts and a $ 50 gift certificate to Shaw's Supermarket despite the fact that Forest barely knew the family at the time.

Detective Feeley knew but did not include the following facts in his affidavit supporting the arrest warrant. Jeffrey is a special needs student and takes ritalin for attention deficit hyperactivity disorder. Prior to this incident, Jeffrey was not angry with Forest for any reason and stated he had no reason to hurt Forest because Forest had been good to his family. Officer Smith had also interviewed Jeffrey and found him credible. Based on Detective Feeley's affidavit, Bail Commissioner Ernest Pratt found probable cause to arrest and approved and signed the warrant.

Forest and his attorney appeared at the Pawtucket police station on January 26, 2000. The detectives arrested Forest and charged him with second degree sexual assault. They then referred the alleged assault to the State Attorney General's office for prosecution.

The Pawtucket School Department also investigated Jeffrey's allegations. On February 8, 2000, the investigator sent a letter to the Superintendent concluding "there was no credible evidence presented that Jeffrey Montella was fondled sexually by Richard Forest in the Life Skills Class." On April 19, 2000, the Attorney General's office declined to prosecute Forest. Consequently, the Rhode Island District Court dismissed the criminal case.

Plaintiffs presented their claims to the Pawtucket City Council as required by Rhode Island General Law *§ 45-15-5*. The Council denied the claims on October 9, 2001. Plaintiffs then filed their original complaint with this Court on April 8, 2002. The Pawtucket Defendants answered the complaint on May 16, 2002. Plaintiffs later amended the Complaint and the First Amended Complaint is now the operative Complaint in this case. The Pawtucket Defendants seek summary judgment on all claims asserted against them. This matter having been briefed and argued, is now in order for decision.

2. Summary Judgment Standard

The Pawtucket Defendants moved for summary judgment on all counts asserted against them under *Rule 56(c) of the Federal Rules of Civil Procedure. Rule 56(c)* of the Federal Rules of Civil Procedure sets forth the standard for ruling on a summary judgment motion:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any

> material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56(c). The critical inquiry is whether a genuine issue of material fact exists. *Menebhi v. Mattos, 183 F. Supp. 2d 490, 498 (D.R.I. 2002)*. "Material facts are those 'that might affect the outcome of the suit under the governing law.'" *Morrissey v. Boston Five Cents Sav. Bank, 54 F.3d 27, 31 (1st Cir. 1995)* (quoting *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986))*. There is a genuine dispute over a material fact when the evidence is such that a reasonable jury could find for the nonmoving party. Id.

In determining whether summary judgment is appropriate, the Court must view the facts in the record and all inferences therefrom in the light most favorable to the nonmoving party. See *Springfield Terminal Ry. Co. v. Canadian Pac. Ltd., 133 F.3d 103, 106 (1st Cir. 1997)*. Where the facts support plausible yet conflicting inferences on a central issue in the case, the Court may not choose between such inferences on a motion for summary judgment. *Menebhi, 183 F. Supp. 2d at 498* (citing *Coyne v. Taber Partners I, 53 F.3d 454, 460 (1st Cir. 1995))*. Summary judgment "is not appropriate merely because the facts offered by the moving party seem most plausible, or because the opponent is unlikely to prevail at trial." *Gannon v. Narragansett Elec. Co., 777 F. Supp. 167, 169 (D.R.I. 1991)*. At the summary judgment stage, there is "no room for credibility determinations, no room for the measured weighing of conflicting evidence such as the trial process entails, no room for the judge to superimpose his own ideas of probability and

likelihood." *Greenburg v. Puerto Rico Maritime Shipping Auth., 835 F.2d 932, 936 (1st Cir. 1987).* Summary judgment is only available when there is no dispute as to any material fact and only questions of law remain. See *Blackie v. Maine, 75 F.3d 716, 721 (1st Cir. 1996).* The moving party bears the burden of showing that no evidence exists to support the nonmoving party's position. See *Celotex Corp. v. Catrett, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986); Rochester Ford Sales, Inc. v. Ford Motor Co., 287 F.3d 32, 38 (1st Cir. 2002).*

3. Discussion

The Pawtucket Defendants make two arguments in support of the present motion. First, that probable cause supports the arrest warrant issued by Bail Commissioner Pratt and therefore Forest's *§ 1983* claims have no viability. Second, that they are entitled to judgment as a matter of law because the doctrine of qualified immunity shields them from liability.

The Supreme Court has instructed courts to separate a qualified immunity analysis from the merits of a *§ 1983* claim because a qualified immunity analysis does not address the substantive viability of the underlying constitutional claim. *Menebhi, 183 F. Supp. 2d at 504.* Courts are to first decide the applicability of qualified immunity. Id.; See *St. Hilaire, 885 F. Supp. 349, 354 (D.N.H. 1995)* (noting the court must resolve qualified immunity claims at the earliest possible date after commencement of suit). Thus, when a defendant asserts the protection of qualified immunity, a court may never reach the merits of the underlying constitutional claim. *Menebhi, 183 F. Supp. 2d at 504.*

However, there are certain cases where the inquiries into qualified immunity and the underlying merits are intertwined. Id.; *Morales v. Ramirez, 906 F.2d 784, 787 (1st Cir. 1990)*. In these cases the qualified immunity analysis unavoidably calls into question the existence of a constitutional violation. Id. See also *Camilo-Robles v. Hoyos, 151 F.3d 1, 7-8 (1st Cir. 1998)* (noting in some cases, the qualified immunity and merit inquiries overlap). Since this is such a case, the Court will consider both the assertion of qualified immunity and the issue of a constitutional violation.

A. The Doctrine of Qualified Immunity

The doctrine of qualified immunity protects government officials performing discretionary functions from liability for civil damages if their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Menebhi, 183 F. Supp. 2d at 498-99*; *Wojcik v. Town of N. Smithfield, 874 F. Supp. 508, 521 (D.R.I. 1995)*. The doctrine attempts to balance citizens' rights with the need to protect officials who are required to use discretion in carrying out their public functions. *Wojcik, 874 F. Supp. at 521*. The general rule of qualified immunity gives government officials the ability "reasonably to anticipate when their conduct may give rise to liability for damages." Id. (quoting *Anderson v. Creighton, 483 U.S. 635, 646, 97 L. Ed. 2d 523, 107 S. Ct. 3034 (1987))*.

Qualified immunity is not a defense to liability. *Saucier v. Katz, 533 U.S. 194, 200, 150 L. Ed. 2d 272, 121 S. Ct. 2151 (2001)*; See also, *Menebhi, 183 F. Supp. 2d at 499*. The doctrine preempts determinations of liability by immunizing government officials from suit.

Id. As such, the issue of qualified immunity presents a legal question appropriate for this Court to decide on summary judgment. Id.

The threshold question in a qualified immunity analysis is whether, viewing the case in the light most favorable to the party asserting the injury, the facts alleged show a constitutional violation. *Saucier, 533 U.S. at 201.* If the court finds the parties' submissions demonstrate a constitutional violation, the next step is to determine whether the right was clearly established. Id. The dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted. Id. See also, *Strail v. Dep't of Children, Youth, and Families of the State of Rhode Island, 62 F. Supp. 2d 519, 529 (D.R.I. 1999)* (applying the above analysis to determine qualified immunity). At this point, courts are to apply a standard of objective reasonableness. *Menebhi, 183 F. Supp. 2d at 499.* See also, *Malley v. Briggs, 475 U.S. 335, 89 L. Ed. 2d 271, 106 S. Ct. 1092 (1986)* (holding the objective reasonableness standard defines the qualified immunity doctrine). A court must make these inquiries in sequence and a single negative finding is sufficient to defeat a plaintiff's claim. *Hatch v. Dep't for Children, Youth & Their Families, 274 F.3d 12, 20 (1st Cir. 2001); Fusco v. Goodale, 2003 U.S. Dist. LEXIS 14034, No. 02-264-P-H, 2003 WL 21960400 at *5 (D. Me. Aug. 14, 2003).* For example, if a court finds no violation of a constitutional right, there is no need for further inquiries regarding qualified immunity. *Saucier, 533 U.S. at 201.*

Constitutional Violation

Count I of the Complaint raises *Fourth Amendment* issues stemming from Forest's alleged unlawful arrest. Forest argues that the facts available to the police officers do not support a finding of probable cause for two reasons. First, the police conducted an inadequate investigation and could not reasonably conclude that they had probable cause to arrest Forest. Second, Detective Feeley omitted material facts in his affidavit which were crucial to determining probable cause.

The *Fourth Amendment* requires that arrests be based on probable cause. *Sietins v. Joseph, 238 F. Supp. 2d 366, 375 (D. Mass. 2003)*. Probable cause, a predicate for qualified immunity, requires a non-technical analysis examining the totality of the circumstances. *Menebhi, 183 F. Supp. 2d at 499* (citations omitted). Probable cause to arrest exists when the facts and circumstances known to the arresting officer are sufficient to permit a reasonably prudent person to conclude that an offense has been, will be, or is being committed. Id.; *Michigan v. DeFillippo, 443 U.S. 31, 37, 61 L. Ed. 2d 343, 99 S. Ct. 2627 (1979)*.

A finding of probable cause does not require an actual showing of criminality. *Menebhi, 183 F. Supp. 2d at 499*. A court must find only a probability or substantial chance of illegal activity. *Id. at 500*. Probable cause to arrest may be based on less than a fifty percent probability of the suspect's guilt. Id. (quoting *Nowaczyk v. Town of N. Hampton, 2001 U.S. Dist. LEXIS 3491, No. Civ 97-635-JD, 2001 WL 274775, at *3 (D.N.H. Mar. 15, 2001)*). One asserting the existence of probable cause guarantees neither the accuracy of the information upon which he reasonably relies nor the ultimate conclusion he reasonably draws therefrom. *Roche v. John Hancock Mutual Life Ins.*

Co., 81 F.3d 249, 255 (1st Cir. 1996). Although dependent upon the specific facts of each case, where there are no factual disputes, or if a court can resolve the issue based on undisputed facts, the existence of probable cause is a question of law for the court to answer. *Bryant v. Noether, 2001 DNH 64, 163 F. Supp. 2d 98, 108 (D.N.H. 2001).* See *Kauch v. Dep't for Children, Youth and Their Families, 321 F.3d 1, 4 (1st Cir. 2003)* (noting whether or not the facts establish a constitutional violation is a question of law).

In assessing the presence of a constitutional violation, this Court must determine whether the officers had probable cause to seek an arrest warrant for second degree sexual assault. A person is guilty of this offense if he or she engages in sexual contact with another person and if any of the following circumstances exist: 1) the accused knows or has reason to know that the victim is mentally incapacitated, mentally disabled or physically helpless; 2) the accused uses force or coercion; or 3) the accused engages in the medical treatment or examination of the victim for purposes of sexual arousal, gratification or stimulation. *R.I. Gen. Laws § 11-37-4* (2002). This Court concludes that the Pawtucket police officers involved in this matter conducted an adequate investigation and made no knowing or reckless omission of material information in the affidavit supporting the arrest warrant. In short, no reasonable jury could find that the Pawtucket Defendants violated Forest's constitutional rights.

Adequacy of the Police Investigation

Forest's first argument challenges the adequacy of the investigation of Jeffrey's complaint. Forest argues that Detectives Feeley and Magill acted unreasonably

by relying solely on Jeffrey's complaint and corroboration by non-witnesses in determining probable cause. This Court finds Forest's arguments unpersuasive.

Circuit precedent is clear; the police may rely on a victim's information or positive identification to establish probable cause to arrest absent some reason to doubt the victim's reliability. *B.C.R. Transport Co., Inc. v. Fontaine, 727 F.2d 7, 10 (1st Cir. 1984)* (noting that although not a per se rule, a probable cause determination predicated on information furnished by a victim is generally considered reliable); accord *Singer v. Fulton County Sheriff, 63 F.3d 110, 119 (2d Cir. 1995)*; *Sharrar v. Felsing, 128 F.3d 810, 818 (3d Cir. 1997)*; *Tangwall v. Stuckey, 135 F.3d 510 (7th Cir. 1998)*; *Clay v. Conlee, 815 F.2d 1164, 1168-69 (8th Cir. 1987)*; *Goodson v. City of Atlanta, 763 F.2d 1381, 1386 (11th Cir. 1985)*. When information comes from a victim or witness rather than an interested informant, there is a presumption that such information carries an indicia of reliability. *Greene v. City of Philadelphia, 1998 U.S. Dist. LEXIS 6594, No. Civ. A. 97-4264, 1998 WL 254062, at *7 (E.D. Pa. May 8, 1998)*. Permitting police officers to rely on a victim's apparent credible statement to determine probable cause is crucial, even when the victim's version is ultimately proven unreliable. *White v. Town of Marblehead, 989 F. Supp. 345, 350 (D. Mass. 1997)*. See *Menebhi, 183 F. Supp. 2d at 500* (noting once a reasonably credible complaint is made, the existence of probable cause does not depend upon the actual truth of the complaint and the focal point becomes the officer's knowledge). A rule requiring the police to second guess an otherwise coherent and credible witness in order to seek corroboration risks

inconsistent and unequal application. *White, 989 F. Supp. at 350.* When the police establish probable cause, the law recognizes the need for urgent and decisive action and the Constitution does not require any further investigation. Id.; *Kelley v. Myler, 149 F.3d 641, 646 (7th Cir. 1998)* (noting if an officer has established cause on every element of a crime, there is no requirement he continue investigating in order to test the suspect's claim of innocence). The mere fact further investigation might have revealed a contrary conclusion is not enough to make the officer's conduct unreasonable. *White, 989 F. Supp. at 350*; *Hotaling v. LaPlante, 167 F. Supp. 2d 517, 522 (N.D.N.Y. 2001).* See *Kelley, 149 F.3d at 646* (noting the inquiry is whether an officer has reasonable grounds on which to act, not whether it was reasonable to conduct further investigation).

Forest relies on Bevier v. Hucal and Kuehl v. Burtis for his argument that officers who ignore readily available evidence are not entitled to qualified immunity. Pls' Mem. Law Supp. Objection to Defs' Mot. Summ. J., at 9. In Bevier, the Seventh Circuit found the officers' actions unreasonable because the officers failed to conduct any investigation and had no evidence of the plaintiff's intent, an essential element of a child neglect charge. *Bevier v. Hucal, 806 F.2d 123, 128 (7th Cir. 1986)* (emphasis added). In Kuehl, the Eighth Circuit found no immunity where the officers ignored exculpatory evidence negating the intent element required to sustain an assault charge. *Kuehl v. Burtis, 173 F.3d 646, 651 (8th Cir. 1999).*

This Court finds both cases distinguishable. Detective Feeley had enough information to support probable cause regarding each element of second

degree sexual assault and was not required to investigate further. *Bevier, 806 F.2d at 128* (noting an officer who has established probable cause on every element of the crime need not continue investigating). Detective Feeley had Jeffrey's complaint of sexual contact, which Jeffrey's mother and the Principal verified. Detective Feeley also knew Jeffrey was a special needs child who took ritilan for his disability. Furthermore, Forest has not presented any evidence to show that the officers ignored any facts that would negate a charge of second degree sexual assault. There is no evidence as to what the children or teaching assistant who were present in the classroom but not interviewed would have said.

This Court concludes that the present case is analogous to *Mutter v. Town of Salem, 945 F. Supp. 402 (D.N.H. 1996)* and *White v. Town of Marblehead, 989 F. Supp. 345 (D. Mass. 1997)*. Like Detective Feeley's application for a warrant, the application at issue in Mutter relied on the victim's statements. *Mutter v. Town of Salem, 945 F. Supp. at 405*. The victim described incidents of sexual assault in detail and identified and described the perpetrator. Id. The detectives knew the victim made similar complaints to her mother and boyfriend. Id. The Court found the level of police investigation objectively reasonable, decided the officers had probable cause to arrest, and held that the officers were entitled to qualified immunity. *Id. at 405, 406*. In White v. Town of Marblehead, the police relied on the victim's complaint and did not interview anyone present at the time of the incident. *989 F. Supp. at 349*. The Court noted that credible words describing "a coherent and, dangerous narrative" were enough to establish probable cause. Id.

Similarly, Jeffrey made a coherent and credible complaint that the police officers could rely upon to establish probable cause. Detective Feeley had Jeffrey's oral and written statements accusing Forest of grabbing and rubbing Jeffrey's penis. Jeffrey previously made the same allegations to his mother and Detective Smith, who found the child believable. Detective Feeley knew that Jeffrey also made the same allegations orally and in writing to Principal Rouselle. Jeffrey told Detective Feeley that he had no reason to hurt Forest because Forest had given Jeffrey's family Christmas gifts and a gift certificate to Shaw's Supermarket. Given these facts, Detective Feeley had no reason to doubt Jeffrey's reliability.

Like the complaint in White, Jeffrey's allegations described a "coherent and dangerous narrative" giving rise to a reasonable concern that Forest would continue teaching and possibly endanger other children if not arrested before the next day of school. See Feeley Aff. Pls'. Ex. 2 at p. 57. The totality of these circumstances leads this writer to conclude that Detectives Feeley and Magill conducted an adequate investigation, had probable cause to arrest Forest, and therefore, did not violate Forest's constitutional rights.

Omissions

Forest argues, in the alternative, that the detectives lacked a reasonable belief in the existence of probable cause because they intentionally omitted facts that the magistrate would have relied upon in determining whether or not to issue an arrest warrant. Specifically, the affidavit did not disclose that Jeffrey was a special needs student taking medication or that the incident

took place in the presence of other students and a teaching assistant.

To establish a constitutional violation using this argument Forest must show: 1) Detectives Feeley and Magill knowingly and deliberately, or with a reckless disregard for the truth, made statements or omissions creating falsehoods in their warrant application; and 2) such statements were material or necessary to the finding of probable cause. *Menebhi, 183 F. Supp. 2d at 502.* An officer makes an assertion with reckless disregard when viewing all the evidence, the officer must have entertained serious doubts regarding the truth of his statements or had obvious reasons to doubt the accuracy of the information reported. *Id. at 503.* The reckless disregard standard requires an officer to have a "high degree of awareness of the statement's probable falsity." Id. (quoting *Wilson v. Russo, 212 F.3d 781, 788 (3d. Cir. 2000)).*

However, awareness of a falsity is not enough to defeat a probable cause determination. *Menebhi, 183 F. Supp. 2d at 503.* Forest must also show that the omitted information was material to determining probable cause. Id. To determine materiality, the court must insert the omitted information and determine whether the corrected affidavit evinces probable cause. Id.; *Freeman v. Murray, 163 F. Supp. 2d 478, 488 (M.D. Pa. 2001).* With an omission, the inquiry is whether its inclusion in the affidavit would have led to a negative finding of probable cause. *U.S. v. Castillo, 287 F.3d 21, 25 (1st Cir. 2002).*

Forest has not presented the necessary factual dispute to avoid summary judgment on this issue. There is no evidence that Detectives Feeley and Magill

omitted material facts from their affidavit knowingly, deliberately, or with a reckless disregard for the truth. Detective Feeley testified he does not put his entire case in a warrant application, includes only what is necessary to cover the elements of the crime, and would never leave something out just to get a magistrate to sign an arrest warrant. Feeley Aff. Pls.' Ex. 2 at pgs. 14, 19.

Forest has not presented any evidence that Detective Feeley should have entertained serious doubts as to the truth of his statements or the accuracy of his information. As stated above, Detective Feeley found Jeffrey credible and knew that Detective Smith previously interviewed Jeffrey and found him believable. Detective Feeley also knew that Jeffrey had given similar accounts to his mother and Principal Rousselle.

In addition, this Court concludes that the omitted information was immaterial to the probable cause determination. The fact that Jeffrey was a special needs student taking medication would have strengthened a probable cause determination as it supports the second element of second degree sexual assault, i.e. the presence of a mental disability. See *Castillo, 287 F.3d at 27* (finding no material omission where the omitted information would have strengthened probable cause). Although the incident took place in front of other students and a teaching assistant and that could help establish Jeffrey's credibility by verifying or disputing his allegations, it was not material to a finding of probable cause. See *Lallemand v. Univ. of Rhode Island, 9 F.3d 214, 215-17 (1st. Cir. 1993)* (finding officer entitled to qualified immunity where affidavit

for arrest warrant was based on victim's statement and did not include statements from other witnesses).

As previously discussed, to be protected by the qualified immunity doctrine, the officers must have held a reasonable belief regarding probable cause. *Hunter v. Bryant, 502 U.S. 224, 228, 116 L. Ed. 2d 589, 112 S. Ct. 534 (1991)*; See *Menebhi, 183 F. Supp. 2d at 500* (noting probable cause and qualified immunity are "inextricably linked such that the determinative issue in a qualified immunity dispute is whether an officer reasonably believed the information he or she possessed constituted probable cause"). Forest has not shown a knowing, deliberate, or reckless omission of material information to undermine the probable cause established by Jeffrey's consistent and credible complaint. In short, there are no disputed material facts to support Forest's allegations of a constitutional violation and no further analysis regarding qualified immunity is required. *Saucier, 533 U.S. at 201* (noting if there is no constitutional violation where the allegations are established, there is no necessity for further inquiries regarding qualified immunity). Therefore, as a matter of law, the Pawtucket Defendants are entitled to qualified immunity and are shielded from suit and liability on Plaintiff's *§ 1983* claims.

B. Forest's *§ 1983* Claims

Forest's failure to show a right to recovery under *§ 1983* provides an additional reason to grant the motion for summary judgment. The statute provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or

> usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983. There are two elements required to establish a cause of action under *§ 1983*. First, a plaintiff must allege the violation of a right protected by the Constitution or laws of the United States. *Parratt v. Taylor, 451 U.S. 527, 535, 68 L. Ed. 2d 420, 101 S. Ct. 1908 (1981)*. Second, a plaintiff must show that the defendant acted under color of state law. Id. In this case, there is no dispute that the officers acted under color of state law. Therefore, in order to survive summary judgment on his *§ 1983* claims, Forest must show that the Pawtucket police officers' conduct rose to the level of a constitutional violation. Given the above analysis, this Court concludes that Forest cannot sustain this burden.

Forest's *§ 1983* Claims Based on the *Fourth Amendment*

Count I of the Complaint alleges violations of the *Fourth Amendment* based on Forest's alleged unlawful arrest. The essential predicate for a *§ 1983* claim for unlawful arrest is the absence of probable cause. *Kelley, 149 F.3d at 646*. See, *Menebhi, 183 F. Supp. 2d at 505* (noting probable cause to arrest leads to a conclusion of

no constitutional violation). As demonstrated above, Defendants had both probable cause to arrest Forest and a valid arrest warrant issued by a judicial officer. Simply put, Forest has not shown that there was a constitutional violation and, thus, has no viable cause of action for false arrest under *§ 1983*.

Forest's *§ 1983* Claims Based on the *Fifth Amendment*

Count II of the Complaint alleges additional grounds for *§ 1983* claims based on violations of the *Fifth Amendment's* guarantees of procedural and substantive due process. Here, it is really the *Fourteenth Amendment* that applies and incorporates the *Fifth Amendment* with regard to state action. With respect to procedural due process, Forest argues a denial of his property interest in continued employment as a tenured teacher without an opportunity to be heard prior to his arrest. Forest also alleges a violation of substantive due process arguing that the officers deprived him of his right to be free from taint in his reputation, good name, honor and integrity. These arguments are unpersuasive.

A plaintiff has a procedural due process claim under *§ 1983* when the alleged conduct deprived the plaintiff of his liberty by a distortion and corruption of the legal process, such as falsifying evidence or some other egregious conduct resulting in the denial of a fair trial. *Senra v. Cunningham, 9 F.3d 168, 173 (1st Cir. 1993).* The plaintiff must also show no adequate state remedy available to rectify the harm. Id.; See *Reid v. State of New Hampshire, 56 F.3d 332, 341 (1st Cir. 1993)* (noting a procedural due process claim may not be redressed under *§ 1983* where an adequate state remedy exists).

This Court concludes that there was no distortion or corruption of the legal process in this case. Forest was arrested following an adequate investigation and based on probable cause. Additionally, Forest has not presented any evidence regarding the inadequacy of state law remedies. On the contrary, the Complaint contains eight counts alleging various state tort claims. Therefore, Forest has no *§ 1983* claim for a violation of procedural due process.

Forest's *§ 1983* claim based on a denial of substantive due process must also fail. To establish a substantive due process violation, a plaintiff must demonstrate an abuse of government power that "shocks the conscience," or an action that is "legally irrational" in that it is not sufficiently tied to any legitimate state interests. *Collins v. Nuzzo, 244 F.3d 246, 250 (1st Cir. 2001)* (quoting *PFZ Properties, Inc. v. Rodriguez, 928 F.2d 28, 31-32 (1st Cir. 1991))*. Courts are reluctant to find "conscience shocking" behavior implicating a constitutional violation when the plaintiff was not physically abused, detained, or prosecuted due to racial or political motivation, or otherwise deprived of equal protection of law. *Senra, 9 F.3d at 173.*

According to Count II of the Complaint, the substantive due process claim is predicated on the alleged wrongful arrest. However, this is not a sufficient substantive due process violation to support a *§ 1983* claim. *Albright v. Oliver, 510 U.S. 266, 274, 127 L. Ed. 2d 114, 114 S. Ct. 807 (1994)* (holding in a *§ 1983* action, substantive due process affords no relief for an arrest without probable cause).

Turning to Forest's claim of a deprivation of his right to be free of taint to his reputation, Forest has

failed to present any evidence indicating that the officers were guilty of irrational or conscience shocking behavior. There is no evidence that Forest was physically abused, detained or prosecuted out of racial or political motivation. Accordingly, Forest has no *§ 1983* claim for violations of substantive or procedural due process.

Forest's *§ 1983* Claims Against the City of Pawtucket

This Court finds two additional grounds supporting its grant of summary judgment in favor of Defendant, City of Pawtucket. First, any liability the City may have under *§ 1983* is derivative. *Flowers v. Fiore, 239 F. Supp. 2d 173, 178 (D.R.I. 2003)*. The City is not liable unless its officers violated Forest's constitutional rights. Id. As previously noted, the officers did not violate Forest's constitutional rights. Second, municipal liability under *§ 1983* only attaches when an official or officials responsible for establishing final policy on a certain subject makes a deliberate choice to follow a certain course of action. *Dyson v. City of Pawtucket, 670 A.2d 233, 238 (1996)* (citing *Pembaur v. City of Cincinnati, 475 U.S. 469, 483-84, 89 L. Ed. 2d 452, 106 S. Ct. 1292 (1986))*. A court may not find a City liable under *§ 1983* unless the plaintiff proves the existence of an unconstitutional policy. *St. Louis v. Praprotnik,485 U.S. 112, 128, 99 L. Ed. 2d 107, 108 S. Ct. 915 (1988)*. Since Plaintiffs have not presented any evidence regarding a relevant policy adopted by the City of Pawtucket, this Court grants summary judgment for this reason as well.

C. State Law Claims Against the Pawtucket Defendants

This Court has jurisdiction over Plaintiffs' state law claims based on the parties' diversity of citizenship. *28 U.S.C. § 1332(a)(1).* Federal courts sitting in diversity must apply the substantive law of the forum state. *Erie R.R. v. Tompkins, 304 U.S. 64, 78, 82 L. Ed. 1188, 58 S. Ct. 817 (1938).* Therefore, this Court will resolve the remaining claims against the Pawtucket Defendants by applying Rhode Island law and, where appropriate, persuasive adjudications by courts of sister states and considerations of public policy as identified in state decisional law. *Norton v. Hoyt, 278 F. Supp. 2d 214, 2003 U.S. Dist. LEXIS 14027, No. 01-0156L, 2003 WL 21939753, at *3 (D.R.I. Aug. 13, 2003).*

Intentional Infliction of Emotional Distress

Count III of the Complaint includes a claim for intentional infliction of emotional distress. Specifically, Forest alleges that the Pawtucket Defendants' conduct was extreme and outrageous and caused him to suffer severe emotional distress. This argument is also unpersuasive.

Under Rhode Island law, a plaintiff must prove four elements to maintain a cause of action for intentional infliction of emotional distress: 1) the conduct must be intentional or done with reckless disregard for the probability of causing emotional distress; 2) the conduct must be extreme and outrageous; 3) there must be a causal connection between the wrongful conduct and the emotional distress; and 4) the emotional distress suffered must be severe. *Norton, 2003 U.S. Dist. LEXIS 14027, 2003 WL at *4.* A plaintiff's failure to prove any one of these elements leads to the claim's demise. Id. Liability is only found where the conduct was so outrageous in character and extreme in degree

as to go beyond all possible bounds of decency and be regarded as intolerable in a civilized community. *Restatement (Second) of Torts § 46cmt. d at 73 (1965)*. See *Champlin v. Washington Trust Co. of Westerly, 478 A.2d 985, 989 (R.I. 1984)* (adopting the standard set forth in *Section 46* of the Restatement Second of Torts).

The Rhode Island Supreme Court also requires a plaintiff to show physical symptomology in order to recover damages. *Norton, 2003 U.S. Dist. LEXIS 14027, 2003 WL at *4*. Plaintiffs must support claims of mental and physical injury with competent expert medical opinion as to origin, existence and causation. Id. (citations omitted). Unsupported conclusory assertions of physical injuries are not enough to survive a motion for summary judgment. Id.

In this case, Forest has not shown the requisite intentional, extreme, and outrageous conduct causing him to suffer severe emotional distress. The mere fact that the Pawtucket Defendants arrested Forest is not enough to support his claim for emotional distress, since the arrest was supported by probable cause. *Sietins v. Joseph, 238 F. Supp. 2d 366, 380 (D. Mass. 2003)* (noting that applying for an arrest warrant and making an arrest pursuant to an issued warrant is not utterly intolerable in a civilized community); *Finucane v. Town of Belchertown, 808 F. Supp. 906, 911 (D. Mass. 1992)*. Furthermore, Plaintiff's complaint relies on unsupported conclusory assertions of physical ills. Forest has not proffered any expert medical opinion regarding the origin, existence, and causation of his alleged physical manifestations. Since there is no evidence to support these essential elements of a claim for intentional infliction of emotional distress, the

Pawtucket Defendants are entitled to summary judgment on this claim as well.

Negligence

In Count IV, Forest alleges that the Pawtucket Defendants were negligent because they breached a duty to conduct a "reasonable, responsible, complete, accurate and/or thorough investigation" of the charges against him. Compl. at para. 74. Under Rhode Island law, Forest must establish: 1) a legally cognizable duty owed to him by the Pawtucket Defendants; 2) a breach of that duty; 3) proximate causation between the Pawtucket Defendants' conduct and his injury; and 4) actual loss or damage. *Mills v. State Sales, Inc., 824 A.2d 461, 468 (R.I. 2003).* Since this Court has concluded that the Pawtucket Defendants conducted an adequate investigation and had probable cause to arrest Forest, there was no breach of duty and summary judgment is appropriate on this count as well. See *Finucane v. Town of Belchertown, 808 F. Supp. 906, 911 (D. Mass. 1992)* (granting summary judgment on a state law negligence claim stemming from an alleged false arrest where the police officers had reasonable grounds or probable cause to arrest).

Malicious Prosecution

Count V of the Complaint states a cause of action for malicious prosecution alleging that the Pawtucket Defendants initiated criminal proceedings against Forest for an improper purpose and without probable cause. To establish the tort of malicious prosecution, a plaintiff must present clear proof that the defendants: 1) initiated a prior criminal proceeding against the plaintiff; 2) without probable cause; 3) maliciously; and

4) the proceeding terminated in the plaintiff's favor. *Rezendes v. Beaudette, 797 A.2d 474, 478-79 (R.I. 2002)*; *Solitro v. Moffatt, 523 A.2d 858, 861-62 (R.I. 1987)*. While recognized in Rhode Island, actions for malicious prosecution are traditionally disfavored because of the belief that they deter criminal prosecutions. *Solitro, 523 A.2d at 862*. Therefore, such actions receive stricter scrutiny, including the requirement that the plaintiff establish the elements of malice and lack of probable cause by clear proof. Id.

This Court's conclusion that the Pawtucket Defendants had probable cause to arrest Forest negates the second element of a malicious prosecution claim. As such, the Pawtucket Defendants are entitled to judgment as a matter of law on Count V of the Complaint as well.

Loss of Consortium

Count VI presents a cause of action for loss of consortium. A married person may recover damages for loss of consortium caused by tortious injury to his or her spouse. *R.I. Gen. Laws § 9-1-41(a)* (2002). Rhode Island law also allows an unemancipated minor to recover damages for the loss of parental society and companionship caused by tortious injury to his or her parent. Id. at (b).

The Rhode Island Supreme Court has held that an action for loss of consortium under *§ 9-1-41* is a derivative claim that is attached to the claims of an injured spouse or parent. *Sama v. Cardi Corp., 569 A.2d 432, 433 (R.I. 1990)*. Such action arises from the injured spouse or parent's physical injury and is dependent upon the success of the underlying tort

claim. Id. Therefore, if a husband or father has no right to recover against a defendant, it follows that a plaintiff wife or child has no such right either. Id.

In this case, Plaintiffs, Nancy and Elizabeth Forest allege that the Pawtucket Defendants' actions surrounding Forest's arrest caused them to suffer losses of Forest's consortium, companionship, and society. However, this Court has concluded that Forest has no right to recovery against the Pawtucket Defendants. Thus, it follows that neither Nancy nor Elizabeth Forest have a right to recover because there is no cause of action upon which to base a derivative claim. Therefore, this Court grants the Pawtucket Defendants' motion for summary judgment on Count VI of the Complaint.

Punitive Damages

Finally, Count VII sets forth a claim for punitive damages against all Defendants. n4 Punitive damages are awarded when there is evidence of willfulness, recklessness or wickedness by the party at fault amounting to criminality that should be punished. *Kingstown Mobile Home Park v. Strashnick, 774 A.2d 847, 859 (R.I. 2001)* (citations omitted). The Rhode Island Supreme Court has held that a punitive damages award against a municipality is contrary to public policy. *Graff v. Motta, 695 A.2d 486, 490 (R.I. 1997)*. A plaintiff may not recover punitive damages without also establishing liability for compensatory or nominal damages. *Kerr-Selgas v. American Airlines, Inc., 69 F.3d 1205, 1214 (1st Cir. 1995)* (citations omitted).

In the instant case, Forest may not recover punitive damages because he has not established that the

Pawtucket Defendants are liable for compensatory damages. Therefore, the Pawtucket Defendants are entitled to summary judgment on Forest's punitive damages claim as well.

IV. Conclusion

For the foregoing reasons, this Court grants the Pawtucket Defendants' motion for summary judgment as to Counts I through VII of the Complaint. This Court has jurisdiction over the remaining state law claims against the Montella Defendants because of diversity of citizenship. Since the Montella Defendants have not filed a motion for summary judgment, Counts VII through XI of the Complaint asserted against them remain for disposition. Therefore, no judgment shall enter until all claims are resolved.

It is so ordered.

Ronald R. Lagueux
Senior United States District Judge
October 22, 2003

n1 No John Doe was ever identified or served, so that claim will be disregarded. See Pride Chrystler Plymouth, Inc. v. Rhode Island Motor, 721 F. Supp. 17, 18 (D.R.I. 1989) (disregarding claims when plaintiffs have not identified the party pleaded as "John Doe").

n2 Nancy and Elizabeth Forest's only cause of action lies in Count VI, a state law claim for loss of consortium. The *§ 1983* claims are asserted solely by Richard Forest. Therefore, for purposes of this decision, the Court will refer only to Plaintiff, Richard Forest.

n3 Plaintiffs' Complaint numbers both claims for loss of consortium and punitive damages as Count VII. For present purposes, the Court simply assumes that the latter is misnumbered, and should read Count VII. That is the punitive damages claim.

n4 As previously stated, this Court will only consider the punitive damages claim against the Pawtucket Defendants because the Montella Defendants did not file a motion for summary judgment.

No. 03-2652

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RICHARD J. FOREST; NANCY FOREST; ELIZABETH FOREST,

Plaintiffs - Appellants

v.

PAWTUCKET POLICE DEPARTMENT; CITY OF PAWTUCKET, by and through its Treasurer, Ronald Wunschel; SCOTT M. FEELEY, in his individual and official capacity; JOHN CLARKSON, in his individual and official capacity; GEORGE L. KELLEY, in his individual and official capacity; DENNIS SMITH, in his individual and official capacity; WILLIAM MAGILL, in his individual and official capacity;

Defendants - Appellees;

JEFFREY T. MONTELLA; GAIL MONTELLA, individually and as parent/legal guardian of Jeffrey T. Montella; CHARLES MONTELLA,

Defendants

8/31/2004

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for rehearing en banc having been carefully considered by the judges of the Court in

regular active service and a majority of said judges not having voted to order that the appeals be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc, be denied.

Amendment IV
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C.S. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, Ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

HISTORY:
(R. S. § 1979; Dec. 29, 1979, P.L. 96-170, § 1, 93 Stat. 1284; Oct. 19, 1996, P.L. 104-317, Title III, § 309(c), 110 Stat. 3853.)

Supreme Court, U.S.
FILED
JAN 7 - 2005
OFFICE OF THE CLERK

No. 04-785

IN THE

Supreme Court of the United States

RICHARD J. FOREST; NANCY FOREST;
ELIZABETH FOREST,

Petitioners,

v.

PAWTUCKET POLICE DEPARTMENT; CITY OF PAWTUCKET, BY AND THROUGH ITS TREASURER, RONALD WUNSCHEL; SCOTT M. FEELEY, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY; JOHN CLARKSON, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY; GEORGE L. KELLEY, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY; DENNIS SMITH, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY; WILLIAM MAGILL, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION

MARC DESISTO
Counsel of Record
MICHAEL A. DESISTO
KATHLEEN M. DANIELS
DESISTO LAW
Attorneys for Respondents
211 Angell Street
P.O. Box 2563
Providence, RI 02906
(401) 272-4442

191941

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

Page

Table of Cited Authorities ii

Reason for Denying the Petition 1

Statement of the Case 2

Statement of the Facts 4

Argument 7

I. There Was Probable Cause To Arrest the Petitioner 7

II. The Respondents Were Not Required To Conduct Additional Investigation Into The Charges Against Petitioner 11

III. The Victim's Status As A Special Needs Student Does Not Affect The Officers' Credibility Determination 13

IV. The Affidavit Submitted In Support Of The Application For An Arrest Warrant Was Not Deficient 15

Conclusion 17

TABLE OF CITED AUTHORITIES

Page

Cases:

Aponte Matos v. Toledo Davila, 135 F.3d 182 (1st Cir. 1998) 15

B.C.R. Transport Co., Inc. v. Fontaine, 727 F.2d 7 (1st Cir. 1984) 1, 8

Beck v. Ohio, 379 U.S. 89 (1964) 8, 14

Bevier v. Mucal, 806 F.2d 123 (7th Cir. 1986) ... 1, 11, 12

Brodnicki v. City of Omaha, 75 F.3d 1261 (8th Cir. 1996) 11

Clay v. Conlee, 815 F.2d 1164 (8th Cir. 1987) 8

Floyd v. Farrell, 765 F.2d 1 (1st Cir. 1985) 8

Forest v. Pawtucket, 290 F. Supp. 2d 215 (D.RI. 2003) 3, 8

Forest v. Pawtucket, 377 F.3d 52 (1st Cir. 2004) 3, 7, 13, 15

Franks v. Delaware, 438 U.S. 154 (1978) 16

Goodson v. City of Atlanta, 763 F.2d 1381 (11th Cir. 1985) 8

Cited Authorities

	Page
Harlow v. Fitzgerald, 457 U.S. 800 (1982)	7
Kelley v. Myler, 149 F.3d 641 (7th Cir. 1998)	1, 11
Roche v. John Hancock Mut. Life Ins. Co., 81 F.3d 249 (1st Cir. 1996)	14
Sharrar v. Felsing, 128 F.3d 810 (3d Cir. 1997)	8
Singer v. Fulton County Sheriff, 63 F.3d 110 (2d Cir. 1995)	8
Tangwell v. Stuckey, 135 F.3d 510 (7th Cir. 1998)	8
United States v. Edwards, 602 F.2d 458 (1st Cir. 1979)	16
Valente v. Wallace, 332 F.3d 30 (1st Cir. 2003)	7
White v. Town of Marblehead, 989 F. Supp. 345 (D. Mass. 1997)	14
United States Constitution:	
Fourth Amendment	2, 3, 15
Fifth Amendment	2

Cited Authorities

Page

Statutes:

42 U.S.C. § 1983 ..... 2, 3

Rules:

Fed. R. Civ. P. 41(a) 3

U.S. Sup. Ct. R. 10 ..... 1, 8

REASON FOR DENYING THE PETITION

It is well established that police officers may rely upon the credible complaint of a victim in order to formulate probable cause. *B.C.R. Transport Co., Inc. v. Fontaine*, 727 F.2d 7, 10 (1st Cir. 1984) (although not a per se rule, a probable cause determination predicated on information furnished by the victim is generally considered reliable). There is likewise no constitutional obligation for police officers to conduct additional investigation after they have established probable cause to make an arrest. *Kelley v. Myler*, 149 F.3d 641, 646 (7th Cir. 1998); *Bevier v. Mucal*, 806 F.2d 123, 128 (7th Cir. 1986). The First Circuit properly applied these well-settled rules in affirming the District Court's holding that there was probable cause to support the arrest of petitioner and that the officers were thus entitled to qualified immunity from the instant suit.

By and through this Petition, petitioner claims that the First Circuit misapplied these properly stated rules of law in upholding summary judgment in favor of the respondents. Petitioner specifically challenges the conclusion that the officers had a reasonable basis to conclude that the victim's complaint was credible. Respondents submit that the instant petition should be denied for two (2) reasons. First, the alleged misapplication of properly stated rules of law is not an appropriate basis for a petition for writ of certiorari. Sup. Ct. R. 10. Secondly, the First Circuit nevertheless did not err in finding that the respondents are entitled to qualified immunity from the instant suit.

Consequently, there is no compelling reason to grant the instant Petition for Writ of Certiorari and Respondents respectfully request that this Honorable Court deny the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Petitioners, Richard J. Forest (hereinafter "petitioner"), his wife and daughter, Nancy and Elizabeth Forest (collectively "petitioners"), filed the instant Complaint against the City of Pawtucket, the Chief of Police, George L. Kelley, III, and police officers John Clarkson, Scott M. Feely, William Magill and Dennis Smith ("respondents") raising claims for violation of petitioners' constitutional rights as well as various state law rights.[1] Petitioners also brought state law claims against Jeffrey Montella and his parents Gail and Charles Montella.[2] Petitioner's Complaint stems from the same incident, namely his alleged unlawful arrest for sexual assault on Jeffrey Montella (hereinafter "Jeffrey"), petitioner's student.

---

1. Petitioners' Complaint specifically raised the following claims: Count I, § 1983 claim for violation of Fourth Amendment right; Count II, § 1983 claim for violation of Fifth Amendment right; Count III, claim for intentional infliction of emotional distress; Count IV, claim for negligence; Count V, claim malicious prosecution; Count VI, claim by Nancy and Elizabeth Forest for loss of consortium; and Count VI {sic} claim for punitive damages.

2. The specific claims against the Montella respondents were negligence, defamation, abuse of process, interference with contractual relations, and loss of consortium. Petitioners' Complaint, Counts VIII – XI.

The Respondents filed a Motion for Summary Judgment on all counts based on the position that there was probable cause to support the issuance of the arrest warrant that led to petitioner's arrest. Alternatively, the Respondents argued that they were nevertheless entitled to qualified immunity. On October 22, 2003, the District Court issued an Opinion and Order granting the Respondents summary judgment. *Forest v. Pawtucket*, 290 F. Supp. 2d 215 (D.RI. 2003), Petitioners' Appendix (hereinafter "P.App."), at 13a. The District Court specifically found that not only were the respondents entitled to qualified immunity from the instant suit but that there was nevertheless probable cause to support petitioner's arrest. Petitioners thereafter dismissed the outstanding claims against the Monella family pursuant to Rule 41(a) of the Federal Court Rules of Civil Procedure and final judgment in favor of the Respondents was entered.

Petitioner filed a limited appeal to the First Circuit from the entry of judgment on Count I, the § 1983 claim for violation of petitioner's Fourth Amendment rights. On July 28, 2004, the First Circuit issued a written Opinion affirming the judgment of the District Court and concluding that the officers were entitled to qualified immunity because the undisputed evidence supported a finding of probable cause. *Forest v. Pawtucket*, 377 F.3d 52 (1st Cir. 2004), P.App. at 1a. On August 31, 2004, petitioner's Petition for Rehearing and suggestion for rehearing en banc before the First Circuit were denied. P.App. at 45a. On November 29, 2004, the instant Petition for Writ of Certiorari was filed with this Court.

STATEMENT OF THE FACTS

On January 24, 2000, at 5:00 P.M., Jeffrey, a 15-year-old student at Tolman High School in Pawtucket, walked into the Pawtucket Police station accompanied by his mother, Gail Montella, to report a sexual assault. Jeffrey reported that he was in his Life Skills class at Tolman High School when petitioner, his teacher, expressed interest in Jeffrey's new fleece jacket. Jeffrey complained that petitioner, while pretending to feel the fleece material at the bottom of the jacket, first rubbed Jeffrey's penis under the jacket, through his pants, and then moved his hand to feel the fleece. Jeffrey, being embarrassed and upset by this activity, asked to leave the room. According to Jeffrey, the petitioner refused to allow Jeffrey to leave the classroom. However, Jeffrey left anyway and went directly to see the school principal, Mr. Rousselle. He related what happened to Principal Rousselle orally and then, at the request of Mr. Rousselle, in writing. Jeffrey Montella's Tolman High School Witness Statement (January 24, 2000), 1st Cir. Appendix (hereinafter "1st Cir. App.") at 91. Deposition of Scott Feeley, November 21-22, 2002 (hereinafter "Feeley Deposition"), at 83 (1st Cir. App. at 140).

As reflected by the diagram provided to the respondent officers, Jeffrey informed the officers that his class consisted of five (5) students. *See* 1st Cir. App. at 142. According to this diagram, only two (2) of these students were facing Jeffrey at the time of the assault while the other students and the teacher's aide were either next to or behind Jeffrey. *Id.*

Jeffrey also informed the respondent officers that the petitioner had touched him on other occasions within the prior year in a manner that made Jeffrey uncomfortable. Jeffrey specifically reported that petitioner had rubbed his

back, shoulders and upper thigh. At the time of these other incidents, Jeffrey reported them to his mother who dismissed the contact as innocent touching.

The respondent officers also interviewed Jeffrey's mother, Mrs. Montella, who confirmed that her son had previously complained to her about petitioner rubbing Jeffrey's shoulders and thigh. She explained, however, that when he first complained she did not believe it be significant because she assumed petitioner was simply being nice to her son. She also assumed that his attention to her son was not out of the ordinary because petitioner had been generous to her entire family, giving them a large bag of gifts at Christmas and a gift certificate to a grocery store. Mrs. Montella also informed the officers that she believed her son's current complaint about petitioner because petitioner had always been nice to her family and she saw no reason for her son to lie.

Mrs. Montella also advised the detectives that Jeffrey had attention deficit, hyperactivity disorder (ADHD) and was on Ritalin. Mrs. Montella, however, further informed them that her son was not mentally incapacitated. Feeley Deposition, at 83 (1st Cir. App. at 117). The detectives, in fact, did not detect any apparent signs of Jeffrey having behavioral or intellectual difficulties. *Id.* at 85 (1st Cir. App. at 118). Rather, they found Jeffrey to be fairly intelligent and credible. *Id.* at 69 & 85 (1st Cir. App. at 114 & 118).

Detective Feeley thereafter contacted Principal Rousselle at his home. Principal Rousselle verified that Jeffrey had come into his office that day, made the same complaint and had provided a hand-written statement. *Id.* at 58-59 (1st Cir. App. at 117). Principal Rousselle also provided the detective

with petitioner's home number. At approximately 8:30 P.M., the detectives telephoned petitioner at his house in Seekonk, Massachusetts and left a message on his answering machine. They tried again at 9:10 P.M. and this time the petitioner answered the phone and agreed to come in at 10:00 P.M. to speak to the detectives concerning the allegation. The detectives prepared an affidavit for an arrest warrant for second degree sexual assault to serve on petitioner when he arrived for the 10:00 P.M. interview. The warrant was approved and signed by the bail commissioner. At 10:00 P.M., petitioner called and said that he was not going to come in without his attorney whom he could not reach at this time. He agreed to come in the following morning.

On January 26, 2000, petitioner came into the Pawtucket police station with his attorney where he was placed under arrest. Pursuant to his attorney's request, petitioner was not questioned and did not provide the officers with a statement. Thereafter, on April 19, 2000, the Rhode Island Department of the Attorney General declined to bring a formal charge and prosecute the case. 1st Cir. App. at 96. As a result of the decision by the Attorney General's Department, the criminal charges against petitioner were subsequently dismissed. Petitioners thereafter brought the instant suit against the investigating and arresting officers as well as the City and the Police Chief.

ARGUMENT

I. There Was Probable Cause To Arrest the Petitioner

Petitioner first seeks a petition to review the First Circuit's determination that the officers were reasonable in their reliance on Jeffrey's complaint in support of the probable cause determination. Petitioners specifically argue that Jeffrey's complaint was "facially unbelievable" such that it not only failed to support the issuance of the arrest warrant but that it required the officers to conduct additional investigation into the charges. Respondents submit that the record fails to support petitioners' allegation that the victim's complaint was facially unreliable. Rather, as found by the First Circuit, the information provided to the police officers supported their conclusion that they had probable cause to arrest and charge petitioner.

The First Circuit affirmed the entry of judgment in favor of respondents based on a finding of qualified immunity. "[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). As correctly noted by the First Circuit, the first threshold inquiry in qualified immunity claims is whether the facts show that an officer's conduct violated a statutory or constitutional right. *Forest*, 377 F.3d at 56 (P.App. at 7a). In the instant case, petitioner claims that his Fourth Amendment rights were violated. In order to succeed on this claim, petitioner must demonstrate that it was clear at the time of the arrest that there was no probable cause for such an arrest. *Valente v. Wallace*, 332 F.3d 30, 32 (1st Cir. 2003)

citing Beck v. Ohio, 379 U.S. 89, 91 (1964). "[P]robable cause exists when facts and circumstances within the arresting officer's knowledge and of which he has reasonably trustworthy information are sufficient to warrant a man of reasonable caution and prudence in the belief that the respondent is committing or has committed a crime." *Floyd v. Farrell*, 765 F.2d 1, 5 (1st Cir. 1985). *See also Beck*, 379 U.S. at 96. In support of a probable cause determination, police officers can justifiably rely upon the credible complaint by a victim. *B.C.R. Transport Co., Inc.*, 727 F.2d at 10.[3]

In the instant case, Petitioners do not challenge these well-settled rules. Rather, Petitioners attack the credibility determination of the officers and allege that the officers were unreasonable in their determination that Jeffrey presented a credible complaint. Petitioners thus seek a writ of certiorari to review the First Circuit's application of the undisputed facts to well-settled rules of law. In addition to the fact that a challenge to a lower court's application of well-settled rules of law is not a proper basis for issuance of a writ of certiorari, Sup. Ct. R. 10, respondents submit that the First Circuit nevertheless did not misapply these rules.

Petitioners' main challenge to the First Circuit's decision is that it was unreasonable for the officers to accept Jeffrey's complaint as credible because Jeffrey allegedly informed the officers that he was grabbed and fondled in front of and while

---

3. As noted by the District Court, this is likewise the rule in other Circuits. *Forest*, 290 F. Supp. 2d at 227 (P.App. at 27a) *citing Singer v. Fulton County Sheriff*, 63 F.3d 110, 119 (2d Cir. 1995); *Sharrar v. Felsing*, 128 F.3d 810, 818 (3d Cir. 1997); *Tangwell v. Stuckey*, 135 F.3d 510 (7th Cir. 1998); *Clay v. Conlee*, 815 F.2d 1164, 1168-69 (8th Cir. 1987); *Goodson v. City of Atlanta*, 763 F.2d 1381, 1386 (11th Cir. 1985).

facing a class of students and support staff. Petitioners maintain that this claim, on its face, is implausible. However, as noted by the First Circuit, according to the diagram provided by Jeffrey to the officers during the January 24, 2000, interview, it was not so obvious that these other students could have seen the alleged assault. In particular, the diagram demonstrates that there were only five (5) students in the class room at the time of the alleged touching. 1st Cir. App. at 142. This diagram also reflects that the teacher's aide (the "support staff") and all but two (2) of these students were either next to or behind Jeffrey at the time of the alleged touching. Thus, based on the diagram's depiction of the location of Jeffrey and of the other students at the time of the alleged assault, it did not necessarily follow that the other students could have witnessed the touching.

Petitioners nevertheless assign error to the First Circuit's reliance on the diagram in support of this conclusion. Petitioners argue that the First Circuit should have reviewed Jeffrey's diagram *only* to confirm that others were in the classroom at the time of the alleged assault. However, petitioner's main challenge to Jeffrey's credibility was the position that it was implausible that petitioner would fondle a student in open view of these students. Thus, the students' questionable ability to actually see the alleged touching was highly relevant to the First Circuit's evaluation of the reasonableness of the officer's actions.

In challenging the credibility determination of the officers, petitioners also ignore the sequence of events that Jeffrey described as leading to the alleged unlawful touching. That is, according to Jeffrey, petitioner questioned him about a new fleece jacket and reached out as if to feel the texture of the jacket. According to Jeffery's complaint, it was while

petitioner was pretending to feel the fleece that he slid his hand under the jacket and unlawfully touched Jeffrey. It is entirely plausible that an individual would use the ruse of touching the jacket to cover an unlawful touching. In fact, it is entirely reasonable to believe that the fleece jacket acted as a cover for the unlawful touching. Therefore, the fact that Jeffrey claimed that the incident occurred in the classroom does not demonstrate or even call into question the reliability of the complaint.[4]

Jeffrey's actions immediately after the incident also supported his claim against petitioner. In particular, Jeffrey immediately left the classroom (without permission) and reported the incident, first orally and then in writing, to Principal Rouselle. In addition, upon returning home that evening, Jeffrey immediately told his mother about the incident. The respondent officers confirmed these actions by interviewing Principal Rouselle and Mrs. Montella before requesting an arrest warrant.

Respondents thus submit that the police officers were reasonable in their reliance upon the credible complaint of the victim to support their application for the arrest warrant. As a matter of law, the information available to the officers at the time of the arrest was sufficient to form probable cause to support the arrest. Accordingly, the First Circuit did not misapply well-settled rules of law in affirming the grant of qualified immunity in favor of the respondents. Consequently, the instant Petition for Writ of Certiorari should be denied.

---

4. In fact, the opposite would be true. That is, if Jeffrey were intentionally seeking to mislead the detectives and falsely accuse petitioner, why would he place himself within a classroom of students, all potential witnesses to the alleged event?

II. The Respondents Were Not Required To Conduct Additional Investigation Into The Charges Against Petitioner

In their second and fourth presented questions for review by way of Writ of Certiorari, petitioners challenge the First Circuit's conclusion that the respondent officers were not required to conduct additional investigation after determining there was probable cause to support petitioner's arrest. Despite the well-settled case law that police officers are not obligated to continue investigating once information to support a finding of probable cause is collected, *Kelley*, 149 F.3d at 646,[5] petitioners seek the instant writ of certiorari on the basis that the presence of any witnesses to an alleged crime imposes a constitutional duty on the part of the officers to question these potential witnesses. Petitioners also argue that the First Circuit erred in distinguishing the Seventh Circuit case of *Bevier v. Hucal*, 806 F.2d 123 (7th Cir. 1986), from the instant case.

Respondents submit in the first instance that Petitioners' reliance upon *Bevier* for the position that police officers must pursue "readily available" evidence prior to making a determination as to probable cause is misplaced. In *Bevier* the Seventh Circuit was actually faced with a situation where the police officers lacked any evidence to support a finding of probable cause on a key element of the crime being charged. *Id.* at 128. Thus, although finding that the *Bevier* respondents were required to conduct additional investigation, the Court expressly noted that police officers who have established probable cause on every element of

5. *See also Brodnicki v. City of Omaha*, 75 F.3d 1261, 1264 (8th Cir. 1996) (Noting that officers are not required to conduct mini-trials before arrest).

the crime need not continue their investigation. *Id.* Quite simply, the Seventh Circuit concluded that a reasonable officer standing in the shoes of the *Bevier* respondents, and lacking evidence regarding an element of the criminal charge, would have explored the readily available information. *Id.* at 128-29.

The instant case is clearly distinguishable primarily because there is absolutely no allegation that any element of the criminal charge of second degree sexual assault was lacking. Rather, the sole basis for petitioner's challenge to the probable cause determination is the position that the victim's complaint was not credible. As noted, *infra*, it was reasonable for the officers to believe that the credible complaint of Jeffrey established probable cause to support the arrest. Just as the *Bevier* Court specifically recognized, because the officers in the instant case had "established [probable] cause on every element of the crime" the officers were under no obligation to pursue additional evidence. *Id.* at 128.

Respondents thus submit that there is no basis for petitioners' claim that the respondent officers were constitutionally required to conduct additional investigation by interviewing witnesses after they had formulated probable cause to support the arrest. The First Circuit properly applied the well-settled rules of law regarding the officers' constitutional obligations. Petitioners' Petition for Writ of Certiorari to review the First Circuit's holding on this issue should accordingly be denied.

III. The Victim's Status As A Special Needs Student Does Not Affect The Officers' Credibility Determination

Petitioner also presents the question of whether it was improper for the First Circuit "to develop and substitute its own conclusion that an adolescent student's learning disability and medication" did not affect the adolescent's credibility. First, respondents submit that petitioner has mischaracterized the First Circuit's holding. The First Circuit actually held that "there is *no evidence* that Montella's condition ... and his prescription ... had any effect on his credibility." *Forest*, 377 F.3d at 57 (P.App. at 9a) (emphasis added). This holding was in response to petitioners' unsupported claim that the fact that Jeffrey was a "special needs student" on Ritalin should have cast doubt on the reliability of his complaint. Accordingly, because the First Circuit did not in the first instance "substitute" its own conclusion as to the effect such a disability would have on the complainant's credibility, the Petition for Writ of Certiorari should be denied.

In addition, despite repeated reference to Jeffrey's "special needs" status, petitioners provided no evidence to support a finding that such a condition affected his intellectual capacity or, more importantly, his credibility. Rather, as noted, Jeffrey was placed in the special needs class because he suffered from ADHD. Before the District Court and again on appeal, petitioners leave it to pure speculation that Jeffrey's ADHD condition called into question Jeffrey's veracity. The undisputed evidence, however, defeats this position. In particular, Mrs. Montella specifically informed the officers that although Jeffrey suffered from ADHD, he was not mentally incapacitated. Feeley's Deposition, at 83 (1st Cir. App. at 117). The officers also made the independent

determination that Jeffrey came across as fairly intelligent and credible. *Id.* There was nothing about his presentation to the officers that would lead them to believe that his ADHD condition would call his credibility into question.

In addition, even if hindsight could be used to challenge the officer's credibility determination,[6] petitioners themselves have failed to offer any evidence by way of medical testimony or otherwise of the effect of ADHD and/or Ritalin, or evidence of the way that the condition specifically affected Jeffrey, to support the allegation that the officers should have questioned Jeffrey's veracity. Moreover, the claim that the officers should have questioned Jeffrey's veracity because he participated in the special needs program at the school is founded on baseless stereotyping that the officers properly rejected in place of their own judgment as to Jeffrey's credibility. *White v. Town of Marblehead*, 989 F. Supp. 345, 350 (D. Mass. 1997). Respondents thus submit that petitioners have offered no competent evidence to support the position that Jeffrey's ADHD condition should have led the officers to question his veracity. The Petition for Writ of Certiorari to review this issue should accordingly be denied.

---

6. All probable cause determinations are made with the information available to the officers and relied upon by the officers at the time of the arrest. Twenty-twenty hindsight cannot be used to defeat a police officer's initial determination that probable cause existed. *Beck*, 379 U.S. at 91 (probable cause exists when, "at th[e] moment [the arrest is made,] the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent [person] in believing that the [individual] had committed or was committing an offense"); *Roche v. John Hancock Mut. Life Ins. Co.*, 81 F.3d 249, 254 (1st Cir. 1996) ("The inquiry into the existence vel non of probable cause is not to be undertaken from the perspective of hindsight but from the perspective of a hypothetical 'reasonable man' standing in the reporting person's shoes at the time when that person acted").

IV. The Affidavit Submitted In Support Of The Application For An Arrest Warrant Was Not Deficient

In addition to attacking the respondents' independent credibility determination, petitioners also seek a Petition for Writ to review whether respondents are liable for alleged deficiencies in the affidavit submitted in support of the arrest warrant. Petitioners specifically claim that the respondents' omission of the fact that the alleged touching took place in a classroom of students violated petitioners' constitutional rights because such information would have defeated the probable cause determination. Petitioners claim that the First Circuit erred in its "holding" that it was possible that these other students would not have seen the alleged touching and thus the omission of such facts was "harmless."

Respondents first object to petitioners' characterization of the First Circuit's holding. Rather than hold that the omission of such information from the arrest warrant was "harmless", the First Circuit actually held that the omission of such information was not *misleading* and thus there was no basis for the claim that the officers acted with reckless disregard for the petitioners' rights. *Forest*, 377 F.3d at 58 (P.App. at 12a).

This holding is entirely consistent with the record on appeal as well as well settled case law. In particular, in order to succeed on a claim for violation of the Fourth Amendment stemming from an alleged omission in an affidavit, petitioners must establish that "'a false statement knowingly and intentionally, or with reckless disregard for the truth, was [omitted] by the affiant in a warrant affidavit . . .'" *Aponte Matos v. Toledo Davila*, 135 F.3d 182, 187 (1st Cir. 1998) (citation omitted). Petitioners must also demonstrate that the

omitted information was necessary to the finding of probable cause. *Id. United States v. Edwards*, 602 F.2d 458, 465 (1st Cir. 1979) *quoting Franks v. Delaware*, 438 U.S. 154, 155-56 (1978). In the instant case, the record is absolutely void of any evidence to support the conclusion that the respondents "knowingly and intentionally" misled the Justice of the Peace in applying for the arrest warrant. Rather, the only evidence before the Court was Detective Feeley's testimony that he does not put his entire case into a warrant application but only includes what is necessary to cover the elements of the crime. Feeley's Deposition, at 14 & 19 (1st Cir. App. 123 & 124). Detective Feeley also testified that he would never leave something out of an affidavit just to get a magistrate to sign an arrest warrant. *Id.* Petitioners can offer no evidence to contradict these representations. In fact, as more fully discussed above, the undisputed evidence supports the conclusion that the respondents reasonably found Jeffrey to be a credible victim. As such, there is no support for the accusation that they knowingly and deliberately, or with reckless disregard for the truth, omitted facts from the warrant affidavit.

In addition, the alleged omitted material is immaterial to the probable cause determination. As more fully discussed *infra*, the fact that Jeffrey claimed the incident took place in class with five (5) students, only two (2) of whom were sitting in their seats across from him, does not defeat the credible complaint of sexual assault nor does it defeat any other element of the crime of sexual assault. Rather, as described by Jeffrey, the petitioner took steps to cover his alleged inappropriate touching by pretending to be touching the fleece jacket. In addition, it simply does not make any sense that if Jeffrey were seeking to falsify a complaint against his teacher, he would place himself in the presence of other students.

Consequently, absent evidence that the respondents knowingly and deliberately omitted material facts in their warrant application, petitioner cannot succeed on the claim that his Fourth Amendment rights were violated. The Petition for Writ of Certiorari to review this issue should accordingly be denied.

CONCLUSION

For the reasons cited herein, Respondents respectfully request that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

MARC DESISTO
Counsel of Record
MICHAEL A. DESISTO
KATHLEEN M. DANIELS
DESISTO LAW
Attorneys for Respondents
211 Angell Street
P.O. Box 2563
Providence, RI 02906
(401) 272-4442